

**DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF
THE PRESIDENT'S MILITARY ORDER ON DETEN-
TION TREATMENT AND TRIAL BY MILITARY
COMMISSION OF CERTAIN NONCITIZENS IN THE
WAR ON TERRORISM**

HEARING
BEFORE THE
COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE
ONE HUNDRED SEVENTH CONGRESS
FIRST SESSION

DECEMBER 12, 2001

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WEDNESDAY, DECEMBER 12, 2001

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room SR-325, Russell Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Kennedy, Lieberman, Cleland, Landrieu, Reed, Akaka, Bill Nelson, Ben Nelson, Dayton, Bingaman, Warner, McCain, Smith, Inhofe, Allard, Sessions, and Collins.

Committee staff members present: David S. Lyles, staff director; Christine E. Cowart, chief clerk; and Bridget M. Whalan, special assistant.

Majority staff members present: Richard D. DeBobes, counsel; Evelyn N. Farkas, professional staff member; Maren Leed, professional staff member; Gerald J. Leeling, counsel; Peter K. Levine, general counsel; and Arun A. Seraphin, professional staff member.

Minority staff members present: Judith A. Ansley, Republican staff director; Charles W. Alsup, professional staff member; Edward H. Edens IV, professional staff member; William C. Greenwalt, professional staff member; Carolyn M. Hanna, professional staff member; Mary Alice A. Hayward, professional staff member; George W. Lauffer, professional staff member; Patricia L. Lewis, professional staff member; Ann M. Mittermeyer, minority counsel; Scott W. Stucky, minority counsel; and Richard F. Walsh, minority counsel.

Staff assistants present: Dara R. Alpert, Daniel K. Goldsmith, Jennifer Key, and Nicholas W. West.

Committee members' assistants present: Frederick M. Downey, assistant to Senator Lieberman; Andrew Vanlandingham, assistant to Senator Cleland; Marshall A. Hevron and Jeffrey S. Wiener, assistants to Senator Landrieu; Elizabeth King, assistant to Senator Reed; Davelyn Noelani Kalipi, assistant to Senator Akaka; William K. Suley, assistant to Senator Bill Nelson; Eric Pierce, assistant to Senator Ben Nelson; Brady King, assistant to Senator Dayton; Wayne Glass, assistant to Senator Bingaman; Christopher J. Paul,

assistant to Senator McCain; Margaret Hemenway, assistant to Senator Smith; J. Mark Powers, assistant to Senator Inhofe; George M. Bernier III, assistant to Senator Santorum; James Beauchamp, assistant to Senator Roberts; Douglas Flanders, assistant to Senator Allard; Arch Galloway II and Rick Dearborn, assistants to Senator Sessions; Kristine Fauser, assistant to Senator Collins; and Derek Maurer, assistant to Senator Bunning.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody. The committee meets this morning to receive testimony from the Department of Defense on the Department's plans to implement the President's military order of November 13, 2001. The President's military order relates to the detention, treatment, and trial by military commissions of certain non-citizens in the war against terrorism. Secretary Rumsfeld has been designated by the President to develop orders and regulations to carry out that military order. Last week, the Attorney General referred many questions from the Judiciary Committee about rules and procedures for the military commissions to the Department of Defense.

The military order was issued by the President in the aftermath of, and in response to, the horrendous terrorist attacks on September 11 of this year. Congress, on September 14, authorized the use of all necessary and appropriate force against those nations, organizations, or persons that planned, authorized, committed, or aided those terrorist attacks or harbored such persons or organizations.

The United Nations Security Council, at the urging of the United States, reacted to those terrorist attacks by calling on all states to work together urgently to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks and stresses, in the words of the United Nations resolution, that "those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts will be held accountable."

On September 11, the North Atlantic Council released a statement that, among other things, said, "Our message to the people of the United States is that we are with you. Our message to those who perpetrated these unspeakable crimes is equally clear: you will not get away with it." For the first time in its history, NATO invoked article 5 of the Washington Treaty, which states that an armed attack on one or more of the allies in Europe or North America shall be considered an attack on them all.

Today, NATO AWACs aircraft are flying patrols over the United States to assist our armed forces in protecting the United States. Heads of government and state have visited the White House to express support for the United States and to pledge their cooperation to bring to justice the perpetrators, organizers, and sponsors of the terrorist attacks.

In light of the extraordinary support from the international community, support which I believe reflects a recognition of and appreciation for the United States' core values of democracy, freedom, tolerance, and respect for due process, I believe that we should work to ensure that the manner in which the military commissions are carried out will not undercut either those core values or that international support. We should also work to ensure that the way

in which the military commissions operate does not jeopardize the standing of the United States to object to unfair conduct by military tribunals of other nations toward U.S. citizens—for example, the secret trials without access to state evidence by a Peruvian military court. Finally, we should work to ensure the military commissions will operate in a manner that doesn't cause other nations, including our allies, to refuse to extradite suspected terrorists to the United States because of the alleged lack of due process provided by such commissions.

I believe there is an appropriate role for military commissions. They have a long history going back, in one form or another, to George Washington, but they must be used wisely, and they must provide for the basic rights for the individuals tried before them so that we do not violate our fundamental values of fairness and due process, values that this Nation has always stood for and values for which American service men and women have risked their lives.

A careful reading of the President's military order raises a number of issues. The scope of coverage is broad, since it includes both past and future acts, and there's no apparent time limit and no definition of terrorism. The order says that it applies not just to, "violations of the laws of war", but also to violations of, "other applicable laws". The Attorney General, in his testimony before the Judiciary Committee last week, said that it would apply only to individuals who committed war crimes. White House Counsel Alberto Gonzales made a similar statement. But the President's military order reads otherwise. There are also many questions about the conduct of the trials before the military commissions.

Before I get into some of those questions, I want to clarify one matter. A number of people, the White House counsel included, have equated military commissions with our system of military justice, including courts-martial. This committee has jurisdiction over the Uniform Code of Military Justice, which is found in Title 10 of the United States Code. There is a difference between the high level of protections afforded our military personnel tried before courts-martial where the evidentiary rules and burden of proof are virtually identical to those in our Federal district courts, and the procedural protections for individuals tried before military commissions. Speaking of them in the same breath creates an erroneous impression about both.

The United States Code itself provides that the principles of law and the rules of evidence that are generally recognized in the Federal trial of criminal cases should apply to military commissions only so far as the President considers practicable. President Bush has already made an affirmative finding in his order that such is not practicable. But what he does require is that the rules and regulations issued by the Secretary of Defense shall, "at a minimum, provide for . . . a full and fair trial." The Secretary of Defense's task, then, is to establish the rules and procedures to assure a full and fair trial.

One of our objectives today is to explore what some of those rules and procedures should include. For instance, does it include the accused's right to present witnesses? Does a full and fair trial provide for the presumption of innocence? Does it provide, for the accused's right to select his own counsel or to have assigned coun-

sel, for those who cannot afford one? Does a full and fair trial necessitate a unanimous vote for the imposition of a death penalty?

Under President Bush's military order, conviction and sentencing can occur on a two-thirds vote of a majority being present. In a 5-person commission with a majority of three members present, that could require a vote of only two of the members of the commission. Can that be tightened by the Secretary of Defense should he determine to do so?

Does a full and fair trial provide for habeas corpus? The Attorney General told the Judiciary Committee that habeas corpus would be available to a person tried by a military commission sitting in the United States. White House Counsel Gonzalez has written that the President's order, "preserves judicial review in civilian courts". But the President's order itself states that, "an individual shall not be privileged to seek any remedy or maintain any proceeding . . . in any court of the United States, or any state thereof." We need to hear how these seemingly conflicting positions are going to be resolved.

Some have suggested that it is aiding terrorists or diminishing our resolve or eroding national unity to discuss the need for fundamental due process in military tribunals. Quite the contrary. What this country is about and what the President's announced intent to bring terrorists to justice was about are values of due process and justice. I hope the Secretary of Defense will welcome constructive discussion of the issues that he must grapple with in designing procedures for military commissions.

Public discussion about how best to dispense justice can make the outcome stronger. It will help assure that military commissions will stand the test of time so that we don't look back with regret at how we handled these critical issues in the crucible in which we find ourselves.

The bottom line for me is this. Military commissions have a role when our Nation is attacked and civilians are deliberately targeted in violation of the laws of war. If the rules adopted by the Secretary of Defense provide for a fundamental level of due process, it will be recognized as such by the civilized nations of the world. These military commissions will not only dispense prompt results, but just results, which, in turn, will enhance the status of the United States as the standard-bearer for democracy, respect for human rights and human liberty.

Senator Warner.

STATEMENT OF SENATOR JOHN WARNER

Senator WARNER. Thank you, Mr. Chairman. Your bottom line, I think, frames the issues before us. I would only add that the President of the United States, who has brilliantly and courageously executed this military operation to date, will continue to see that his cabinet officers, primarily the Secretary of Defense, who's represented here today by a very distinguished Deputy Secretary of Defense, will formulate those regulations in such a way as to preserve the absolutely essential fundamental due process to which you referred. We must do this if we are to continue in this war against terrorism and have the vital support that is necessary of coalition nations joining in these efforts.

This is a clear example of the constitutional authority of a President of the United States in the time of war. It goes way back into the history of our Nation. Many other Presidents faced with comparable situations have exercised their constitutional right to establish these tribunals.

Now, the Department of Defense, thus far, is proceeding, in my judgement, very carefully and very thoroughly to devise these regulations, consulting with other departments and agencies of the Federal Government and reaching outside of government to receive the benefit of counsel from those who have had long careers in law and who have spent their lifetime ensuring due process for others. I hope, at some eventual time, the Secretary of Defense can share with the public those many distinguished scholars and others who have worked with you in this challenge.

The use of the military commissions and courts martial are the most widely accepted venues for enforcing violations of the law of war, a body of law virtually unknown to the average citizens here in our Nation, but nevertheless, well established international law within our own jurisprudence.

The events of September 11 that resulted in the murder of thousands of our innocent—and I repeat, innocent—American civilians and many others from over 80 nations, were acts of war against the United States and against the whole civilized world. The United Nations and NATO have endorsed the United States' right to use military force in self defense. Congress has authorized the use of force. We are in a war, and we will follow through and conclude these military operations at some time in the indefinite future. But in the meantime, it is incumbent upon our President to begin to lay the foundation for bringing to the courts of justice those who are identified as perpetrators of these crimes.

Mr. Chairman, we are privileged on this committee to have several members of the Judiciary Committee of the United States Senate. That committee has done a good deal of work on this issue, including four hearings. On our side, we have Senator Sessions. I'm going to ask that my statement be incorporated into the record and yield a few minutes to him with my concluding remark. This Nation is faced with perhaps the most serious challenge in contemporary America to balance due process, freedom, civil liberties, all of those things we hold most dearly, against the need to bring to justice, in a sense of fairness, those who are identified as the perpetrators of this series of crimes. We will achieve that, I am confident.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT BY SENATOR JOHN WARNER

Thank you, Senator Levin. I join you in welcoming our distinguished witnesses, who will provide testimony and clarification on how the Department of Defense plans to implement the President's recent Military Order on military commissions. This is the first in what I expect to be a series of hearings by this committee to exercise our oversight regarding the use of these military commissions.

To be very clear, we are talking about trials for the terrorists who carried out the horrific attacks of September 11, and those who aided them. The United States was attacked, with grievous loss of life, by a hostile foreign force. The terrorists declared war on the United States on September 11, and the President has responded with the full and appropriate force and power of the United States.

The events of September 11 were clearly acts of war. These attacks intentionally targeted civilians and sought to cause indiscriminate death and destruction clear violations of the law of war (i.e., the internationally accepted laws governing the conduct of military operations). The military order of November 13 establishing military commissions to try these terrorists is a logical next step.

The precedents for the use of such commissions date back to the formative days of our Republic and extend through their most recent use at the conclusion of World War II. The Supreme Court has repeatedly upheld the constitutionality of using military commissions to prosecute individuals charged with violations of the law of war. In one such ruling, the Supreme Court explained, "Since our Nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."

Clearly, the establishment of such commissions is within the constitutional authorities granted the President. In addition, title 10 of the U.S. Code affirms the President's authority to employ military tribunals and establish rules for their guidance.

The congressional role in this process is one of oversight; of ensuring that the procedures established for the conduct of these commissions are comprehensive, appropriate to current circumstances and fair. We begin that oversight this morning.

Each circumstance under which a military commission has been used in the past has been different, requiring the establishment of unique rules and procedures. There will be no difference this time. I am confident the Department understands its responsibilities in this regard, and will propose guidelines that will meet the moral and legal standards this Nation expects and so steadfastly defends, at home and around the world.

Military commissions and courts-martial are the most widely accepted venues for enforcing violations of the law of war. The events of September 11 that killed approximately 4,000 civilians from over 80 nations were acts of war against the United States, and against the civilized world. The United Nations has endorsed the United States' right to use military force in self-defense, and Congress has authorized the use of force.

That we are at war against foreign terrorists that disregard the most fundamental principles of morality and law cannot be disputed. Such times demand that we utilize all means at our disposal to defend our Nation, ensure the welfare of our citizens and preserve our liberties.

I thank our witnesses for the opportunity to discuss this important subject today. I look forward to working with you and my colleagues in Congress as we discuss how best to ensure that justice is done in a timely, prudent, and fair manner. Thank you.

So, Mr. Sessions, if you'd take the balance of my time. Thank you for your work on this subject.

STATEMENT OF SENATOR JEFF SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman and Mr. Ranking Member, and I thank you for your remarks because we're talking about some matters of real importance. I thought it would be valuable, Senator Warner, to recapitulate some of the things that have occurred already.

There have been four hearings in the Judiciary Committee, one before the full Judiciary Committee, in which Mr. Michael Chertoff, the Assistant Attorney General, Criminal Division, answered questions concerning all matters dealing with the Nation's response to these terrorist attacks, including military commissions. Then we had a subcommittee hearing with Senator Schumer, where I'm the ranking member, and it dealt solely with the military commission. I think we had a lot of extreme comments early on about what was right and legal and proper.

I think after that hearing, all of us concluded that there was a firm constitutional and historical and legal basis for military commissions and even liberal professors, such as Laurence Tribe and Cass Sunstein, both affirmed their belief that a military commis-

sion is a legitimate way to deal with illegal combatants in a time of war.

Senator Feingold also had a hearing that I participated in on issues relating to the terrorist attacks. Then we had a full committee hearing of about 4 hours with the Attorney General in which he answered all kinds of questions dealing with this entire matter.

I felt like, after that, many of the concerns had been allayed. Many of the fears that some people initially expressed had been satisfied, and the procedures that were ongoing, when clearly studied, were the kind of procedures we can be proud of.

So I think, at this point, the military commission is legitimate. I think it's appropriate that the Department of Defense be working on the procedures to conduct those. The Uniform Code of Military Justice (UCMJ) that we authorized in this Congress specifically gives the President the power to set the procedures for a military commission. Ultimately, they'll have to be fair. The Department of Defense will have to be sure these trials are conducted fairly.

But I think we would do well to recognize that this Senate really isn't in a position to draft specific procedures for military trials under these circumstances. We should let the Defense Department do that and evaluate them as they go forward.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Sessions. Senator Kennedy, of course, is also on the Judiciary Committee. In chatting with Senator Warner here, we thought it would be appropriate also for Senator Kennedy to speak, should he desire. Then we're going to go to our witnesses, and then come back to an 8-minute round of questions.

STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Thank you. First of all, I think any of us who are meeting today are once again mindful, as our two chairs have said, about thanking you, Mr. Secretary, and through you, the military forces of our country that are doing such a superb job. I think all Americans feel that way. It's just one more expression of that feeling. Second, thank you very much for being here to discuss this topic.

As a member of the Judiciary Committee, and also the Armed Services Committee, the two committees' interest in justice and also the pursuit of those that are violating our laws are best, I think, illustrated by this morning's announcement that the Justice Department will go ahead with Zacarias Moussaoui and try him in a Federal court. That's in the Judiciary Committee's jurisdiction; military tribunals are in this committee. We're talking about a person that is going to be charged with the kinds of crimes that threaten the lives of American citizens. That decision is a clear expression of the administration's confidence in the Federal courts and where all the rights and protections will be accorded to the defendant in that.

We are now considering military tribunals. We're going to be interested in what protections are going to be there, in terms of those that will be under the military tribunals, in defining how the administration is going to make the judgments between one and the other.

I think that this decision by the Justice Department is enormously significant. At a time in your comments, I'd hope you would express whether you supported that decision and how you evaluated that decision, what the considerations were in your own mind about why that order has gone to the Federal courts as compared to going to the military court. I think these illustrations of the military tribunal, which we'll be discussing today, the decision to try one of the leading terrorists in a Federal court illustrates at least the challenges that we're going to be faced with. I will be enormously interested, as one who has prime interest and responsibility in both of these areas, to hear your views about this.

Thank you, Mr. Chairman. I would ask that my full statement be made a part of the record.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT BY SENATOR EDWARD M. KENNEDY

All of us are proud of the men and women of our Armed Forces for all they've done and, all they are doing for our country. Our service men and women are courageously answering the call to defend our country and preserve our freedom, and we owe them our strongest possible support.

Here at home, Americans today are more united than ever in our commitment to win the war on terrorism and protect the country for the future. An essential part of meeting this challenge is protecting the ideals that America stands for in this country and around the world.

I continue to have serious concerns about the President's order on military tribunals. The Constitution gives Congress the power to define and punish "offences against the law of nations," and to create courts inferior to the Supreme Court. Yet Congress has not expressly authorized the kind of military tribunals in the President's order.

The Military Order is excessively broad. It could potentially affect 20 million lawful resident aliens in the United States. It applies not only to suspected members of al Qaeda, but also to people not suspected of any involvement in the September 11 attacks. It authorizes military tribunals to try individuals not only for war crimes, but also for violations of other unspecified laws. While the order requires "full and fair trials," it does not explain what "full and fair" means. It allows completely secret trials, conducted outside the established rules of military justice. It states that defendants "shall not be privileged" to appeal their convictions and sentences to any state, Federal, or international court.

In its current form, the order is inconsistent with principles of justice that the United States has advocated internationally. Over the years, our government has opposed military tribunals in other nations because of their failure to provide adequate due process.

The State Department's most recent human rights report criticized the use of military courts in Peru in the case of Lori Berenson, an American who was tried for terrorism by a secret military tribunal. As the report stated, "Proceedings in these military courts . . . do not meet internationally accepted standards of openness, fairness, and due process."

On the use of military tribunals to try accused terrorists in Egypt, the State Department said that the "use of military and State Security Emergency courts . . . has deprived hundreds of civilian defendants of their constitutional rights to be tried by a civilian judge. . . . [T]he military courts do not ensure civilian defendants due process before an independent tribunal."

The United States, by authorizing secret military tribunals now, without fundamental due process guarantees in place, may be accused of a double standard. The order may also limit our ability to extradite terrorist suspects apprehended by our allies.

Given the broad scope of the original military order, even if it's narrowed now, I'm concerned that it will be used by other countries to justify secret military tribunals and avoid basic due process safeguards. It can undermine America's credibility in criticizing secret military tribunals in other countries. Our military tribunals may never be seen as legitimate by other countries.

The Secretary of Defense has been given the responsibility of drafting rules for the tribunals. By narrowly defining the scope of the tribunals' use and providing basic due process safeguards, the Secretary can do much to ease the serious con-

cerns about the President's order. I urge the Secretary to include the following safeguards to identify the guilty and protect the innocent:

- an independent and impartial tribunal
- the presumption of innocence
- proof "beyond a reasonable doubt"
- open and public trials, with exceptions only for demonstrable reasons of national security or public safety
- representation by independent and effective counsel
- the right to examine and challenge evidence offered by the prosecution
- the right to present evidence of innocence
- the right to cross-examine adverse witnesses and to offer witnesses
- fixed, reasonable rules of evidence
- fair appellate review of convictions and sentences

In preparing rules for military tribunals, the Department has an excellent model—the Uniform Code of Military Justice. As White House Counsel Alberto Gonzales recently wrote, the "American military justice system is the finest in the world." There is no reason now to depart substantially from established principles of military justice.

It is also important to apply the military order narrowly. It may make sense to use military tribunals to try members of al Qaeda who are captured in Afghanistan and are suspected of war crimes. It would be a mistake, however, for military tribunals to replace our existing system of criminal justice here in the United States. Testifying before the Judiciary Committee 2 weeks ago, Assistant Attorney General Michael Chertoff testified that he had complete faith in the ability of Federal criminal courts to try terrorist cases. He stated:

I have to say that the history of this government in prosecuting terrorists in domestic courts has been one of unmitigated success and one in which the judges have done a superb job of managing the courtroom and not compromising our concerns about security and our concerns about classified information.

I'm encouraged by the Justice Department's announcement yesterday that it has obtained an indictment against suspected terrorist Zacarias Moussaoui in Federal court. To the fullest extent possible, we should use our domestic courts to try terrorists, and let the military focus on what it does best—protecting our country and our freedoms.

Chairman LEVIN. Thank you, Senator Kennedy. Now, Secretary Wolfowitz, we turn to you. Thank you for coming, and, again, we all join Senator Kennedy's sentiments about the extraordinarily brilliant manner in which this matter has been handled, militarily. We thank you. We thank the Secretary and his staff for their total commitment and focus on prevailing, and, of course, the men and women of our military for their truly superb operations.

STATEMENT OF HON. PAUL D. WOLFOWITZ, DEPUTY SECRETARY OF DEFENSE

Secretary WOLFOWITZ. Since thanks are due here, I think thanks are due to the committee and to Congress for the great support they've given to the Defense Department over the years and particularly in recent months in this war effort. As every one has indicated, I think most of all we, as a Nation, are indebted to the brave men and women in uniform who have been conducting this operation brilliantly and bravely and, so far, quite successfully, although there's a lot more work to do.

Mr. Chairman, I'm not sure I've ever delivered a statement that is the testimony of the Secretary of Defense as well as myself, but that is what I'm doing this morning. Secretary Rumsfeld had very much hoped to be here this morning, but unfortunately he had a National Security Council meeting and was prevented from attending. He and I prepared this statement, which he had intended to deliver this morning, and which I would now like to present to the

committee, but I would like to have the record reflect that it is a statement from both the Secretary and myself.

Also, I have with me General Counsel of the Department of Defense, Jim Haynes, who, unlike myself, is a lawyer and can answer some of your questions much better than I will be able to.

Mr. Chairman, on September 11, Americans found their Nation under attack. Terrorist hijacked civilian airliners, turned them into missiles, and used them to kill thousands of innocent Americans—men, women, and children—as well as people from dozens of nations.

Today, 3 months after the attack, the ruins of the World Trade Towers are still burning, and bodies are still being pulled from the wreckage. Over the weekend, the remains of 20 more were recovered—5 firefighters, 2 policemen, and a group that had been trapped in a stairwell as they tried to escape the collapsing tower. Their families will now be able to bury them, but many hundreds of families who lost loved ones—mothers and father, husbands and wives, sisters and brothers, sons and daughters—still have not been able to bury their dead and possibly never will.

It is still difficult to fathom the enormity of what happened on September 11. As time passes and the fires finally burn out, Americans will eventually recover from the shock and horror of what befell our Nation that day. But those who are responsible for our national defense must not lose sight of the fact that these are not normal times. We have been attacked. We are at war. We must take the steps necessary to defend out people and to protect them from further harm.

The September 11 attacks were acts of war. The people who planned and carried out these attacks are not common criminals. They are foreign aggressors, vicious enemies whose goal was and remains to kill as many innocent Americans as possible. Let there be no doubt, they will strike again unless we are able to stop them. We have no greater responsibility as a Nation than to stop these terrorists, to find them, to root them out, and to prevent them from murdering more of our citizens.

To accomplish that objective, the President is marshaling every tool at his disposal—military, diplomatic, financial, economic. He is working to freeze the assets of terrorist leaders and organizations that sponsor and finance terror. He is working with foreign governments to shut down the terrorist networks that operate in dozens of countries across the world. He has sent brave Americans to Afghanistan—courageous soldiers, sailors, airmen, and marines—who at this moment are risking their lives to stop the al Qaeda terrorist network and the Taliban that seek to kill our people.

This is not a law-enforcement action. It is war. We seek to destroy or defeat our terrorist enemies so they cannot harm Americans. When coalition forces storm the Taliban compound or an al Qaeda safe-house, they cannot ask for a search warrant. When they confront Taliban or al Qaeda fighters in the caves and shadows where they hide, they are in combat. Their objective is to stop the terrorists and prevent them from continuing to threaten our country.

The U.S. military is doing this in Afghanistan, and they are doing it extremely well. But the terrorists who threaten us are not

only in Afghanistan. They operate in dozens of countries, including the United States. They are unlawful belligerents, adversaries who attacked our Nation in contravention of the rules of war, and the President has made it clear that we will hunt them down wherever they hide.

When enemy forces are captured, wherever they are captured, they must then be dealt with. There a number of tools at the country's disposal for doing so. One of those tools is the establishment of the Military War Crimes Commission. The President, as Commander in Chief, has issued a military order that would permit individual non-U.S. citizens to be tried by military commission. As yet, he has not designated anyone to be tried by such a commission. He may do so. He may not.

To prepare for the possibility that he may do so, the Department of Defense is developing appropriate procedures for such commissions. We are in the process of developing those procedures. We are consulting a wide variety of individuals and experts inside and outside of government to discuss how such commissions should operate and how they have operated in the past. We are working to establish rules of procedure that will ensure, in the event that the President decides to designate a non-U.S. citizen to be tried by a military commission—and I would underscore that he has not yet designated anyone to be tried in this manner, and that it would only apply to non-U.S. citizens—but should he decide to designate a non-U.S. citizen to be tried by a military commission, it will be handled in a measured, balanced, and thoughtful way that reflects our country's values.

Military commissions have been used in times of war since the founding of this Nation. George Washington used them during the Revolutionary War. Abraham Lincoln used them during the Civil War. President Franklin Roosevelt used them during World War II. During and following World War II, we did not bring German and Japanese war criminals to the United States for trial in civilian courts. We tried them by military commissions. In Germany, we prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions, of which 856 were convicted.

These conviction rates, you will note, are not out of line with normal non-military commission outcomes. Indeed, they are lower than the felony conviction rate in the U.S. Federal courts last year.

When eight Nazi saboteurs landed on our coast in 1942, with the intention and purpose of destroying American industrial facilities, they were tried by military commission. Indeed, in that case, the Supreme Court upheld the constitutionality of military commissions. In the case of *Ex parte Quirin*, the court ruled unanimously, in an eight-to-zero decision, that the trial of the Nazi saboteurs by a military commission without a jury was indeed constitutional, declaring, in the court's words, "unlawful combatants...are subject to punishment by military tribunals for acts which render their belligerency unlawful."

Further, the U.S. Congress also recognized the use of military commissions after World War II, when it passed the Uniform Code of Military Justice in 1950. It included statutory language preserv-

ing the jurisdiction of military commissions. So all three branches of the U.S. Government have endorsed the use of military commissions.

Mr. Chairman, our ability to bring justice to foreign terrorists is critical to our ability to defend the country against future terrorist threats. Moreover, it is well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution.

Furthermore, there are a number of compelling reasons for using military commissions instead of civilian courts to try unlawful belligerents in times of war. First, by using military commissions, we can better protect civilian judges, jurors, and courts from terrorist threats and assure the security of the trial itself. Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront, but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack, the 1993 attack, is still under 24-hour protection by Federal marshals and probably will be for the rest of his life.

It is also important to avoid the risk of terrorist incidents, reprisals, or hostage-takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit speedy, secure, fair, and flexible proceedings in a variety of locations that would make it possible to minimize these risks.

Second, Federal rules of evidence often prevent the introduction of valid factual evidence for public-policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence, flexibility which could be critical in wartime when it may be difficult, for example, to establish chains of custody for documents or to locate witnesses. Military commissions allow those judging the case to hear all probative evidence, including evidence obtained under conditions of war, evidence that could be critical to obtaining a conviction.

Third, military commissions can allow the use of classified information without endangering sources and methods. This point is critical. During the course of a civilian trial, prosecutors could be faced with a situation where in order to secure a conviction, they would have to use classified information that would expose how the U.S. monitors terrorist activities and communications. They could be forced to allow terrorists to go free or to offer them lighter sentences in order to protect a source that is critical to our national security.

Do we really want to be in the position of choosing between a successful prosecution of an al Qaeda terrorist or revealing intelligence information, which, if exposed, could reduce our ability to stop the next terrorist attack, at a cost of thousands more American lives? A military commission can permit us to avoid this dilemma. We can protect national security, including ongoing military operations in Afghanistan while at the same time ensuring a full and fair trial for any individuals that might be designated by the President.

Again, Mr. Chairman, the President has not designated anyone, so far, to be tried by military commission, and we have not yet concluded or issued regulations or established rules of procedure, but we are at war with an enemy that has flagrantly violated the rules of war. They do not wear uniforms. They hide in caves abroad and among us here at home. They target civilians—innocent men, women and children of all races and religions—and they intend to attack us again, let there be no doubt. They are not common criminals. They are war criminals. We must, and we will, defend this country from them.

Military tribunals are one of many instruments we may use to do so. We are confident that we will develop a process that Americans will have confidence in and which is fully consistent with the principles of justice and fairness our country is known for throughout the world. We have a reputation as a Nation for dealing fairly in these kinds of matters, and we will do so in this case. We will bring justice to the terrorists and ensure that the American people can once again live their lives in freedom and without fear.

Mr. Chairman, I believe this hearing and the views of this committee can be an important contribution to making sure that we achieve those goals, and we appreciate the opportunity to testify before you. Thank you.

[The prepared joint statement of Secretary Rumsfeld and Deputy Secretary Wolfowitz follows:]

PREPARED JOINT STATEMENT BY DONALD H. RUMSFELD AND PAUL WOLFOWITZ

Mr. Chairman, Members of the Committee, good morning.

On September 11, Americans found their Nation under attack. Terrorists hijacked civilian airliners, turned them into missiles, and used them to kill thousands of innocent Americans—men, women, and children—as well as people from dozens of nations.

Today, 3 months after the attack, the ruins of the World Trade Towers are still burning—and bodies are still being pulled from the wreckage. Over the weekend, the remains of 20 more were recovered—5 firefighters, 2 policemen, and a group that had been trapped in a stairwell as they tried to escape the collapsing tower. Their families will now be able to bury them. But many hundreds of families who lost loved ones—mothers and fathers, husbands and wives, sisters and brothers, sons and daughters—still have not been able to bury their dead . . . and possibly never will.

It is still difficult to fathom the enormity of what happened on September 11. As time passes, and the fires finally burn out, Americans will eventually recover from the shock and horror of what befell our Nation that day.

But those who are responsible for our national defense must not lose sight of the fact that these are not normal times. We have been attacked. We are at war. We must take the steps necessary to defend our people, and protect them from further harm.

The September 11 attacks were acts of war. The people who planned and carried out these attacks are not common criminals—they are foreign aggressors, vicious enemies whose goal was, and remains, to kill as many innocent Americans as possible.

Let there be no doubt: they will strike again, unless we are able to stop them.

We have no greater responsibility as a Nation, than to stop these terrorists—to find them, root them out, and prevent them from murdering more of our citizens.

To accomplish that objective, the President is marshalling every tool at his disposal—military, diplomatic, financial, economic. He is working to freeze the assets of terrorist leaders and organizations that sponsor and finance terror. He is working with foreign governments to shut down the terrorist networks that operate in dozens of countries across the world. He has sent brave Americans to Afghanistan—courageous soldiers, sailors, airmen and marines, who at this moment are risking their lives to stop the al Qaeda terrorist network and the Taliban that seek to kill our people.

This is not a law enforcement action. It is war. We seek to defeat or destroy our terrorist enemies, so that they cannot harm Americans. When coalition forces storm a Taliban compound or an al Qaeda safe house, they cannot first ask for a search warrant. When they confront Taliban or al Qaeda fighters in the caves and shadows where they hide, they are in combat. Their objective is to stop the terrorists and prevent them from continuing to threaten our country.

The U.S. military is doing this in Afghanistan—and they are doing it extremely well. But the terrorists who threaten us are not only in Afghanistan. They operate in dozens of countries—including the United States. They are, and remain, unlawful belligerents, adversaries who attacked our Nation in contravention of the rules of war. The President has made it clear that we will hunt them down wherever they hide.

When enemy forces are captured, wherever they are captured, they must then be dealt with. There are a number of tools at the country's disposal for doing so. One of those tools is the establishment of military war crimes commissions.

The president, as commander in chief, has issued a military order that would permit individual non-U.S. citizens to be tried by military commission. As yet, he has not designated anyone to be tried by such a commission. He may do so; he may not.

To prepare for the possibility that he may do so, the Department of Defense is developing appropriate procedures for such commissions.

We are in the process of developing these procedures. We are consulting a variety of individuals and experts, in and out of government, to discuss how such commissions should operate, and how they have operated in the past. We are working to establish rules of procedure that will ensure, in the event the President decides to designate a non-U.S. citizen to be tried by a military commission, that it is handled in a measured, balanced, thoughtful way that reflects our country's values.

Military commissions have been used in times of war since the Founding of this Nation. George Washington used them during the Revolutionary War; They were used during the Civil War; President Franklin Roosevelt used them during World War II.

During and following World War II, we didn't bring German and Japanese war criminals to the U.S. for trial in civilian courts. We tried them by military commissions. In Germany, we prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions—of which 856 were convicted. These conviction rates are not out of line with normal, non-military commission outcomes—indeed, they are lower than the felony conviction rate in the U.S. Federal courts last year.

When eight Nazi saboteurs landed on our coast in 1942, with the intention of destroying American industrial facilities, they were tried by military commissions.

Indeed in that case, the Supreme Court upheld the constitutionality of military commissions. In *Ex parte Quirin*, the Court ruled unanimously—in an 8–0 decision—that the trial of the Nazi saboteurs by a military commission, without a jury, was indeed constitutional, declaring “unlawful combatants are subject to punishment by military tribunals for acts which render their belligerency unlawful.”

Further, the U.S. Congress also recognized the use of military commissions, after World War II, when it passed the Uniform Code of Military Justice in 1950, which included statutory language preserving the jurisdiction of military commissions. So all three branches of the U.S. Government have endorsed the use of military commissions.

Our ability to bring justice to foreign terrorists is critical to our ability to defend the country against future terrorist threats. Moreover, it is well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution. Furthermore, there are a number of compelling reasons for using military commissions instead of civilian courts to try unlawful belligerents in times of war.

First, by using military commissions, we can better protect civilian judges, jurors and courts from terrorist threats and assure the security of the trial itself.

Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack is still under 24 hour protection by Federal marshals—and probably will be for the rest of his life.

It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit

speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.

Second, Federal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence—a flexibility which could be critical in wartime, when it is often difficult, for example, to establish chains of custody for documents or to locate witnesses. Military commissions allow those judging the case to hear all probative evidence—including evidence obtained under conditions of war—that could be critical to obtaining a conviction.

Third, military commissions can allow the use of classified information without endangering sources and methods. This point is critical. During the course of a civilian trial, prosecutors could be faced with a situation where, in order to secure a conviction, they would have to use classified information that would expose how the U.S. monitors terrorist activities and communications. They could be forced to allow terrorists to go free, or offer them lighter sentences, in order to protect a source that is critical to our national security.

Do we really want to be in the position of choosing between a successful prosecution of an al Qaeda terrorist, and revealing intelligence information that, if exposed, could reduce our ability to stop the next terrorist attack—at a cost of thousands more American lives?

A military commission can permit us to avoid this dilemma. We can protect national security, including ongoing military operations in Afghanistan, while at the same time ensuring a full and fair trial for any individuals designated by the President.

Again, Mr. Chairman, the President has not designated anyone to be tried by military commission, and we have not yet issued regulations or established rules of procedure.

But we are at war with an enemy that has flagrantly violated the laws of war. They do not wear uniforms. They hide in caves abroad, and among us here at home. They target civilians—innocent men, women and children of all races and religions. They intend to attack us again. Let there be no doubt.

They are not common criminals—they are war criminals. We must—and we will—defend this country from them.

Military tribunals are one of many instruments we may use to do so. We are confident that we will develop a process that Americans will have confidence in, and which is fully consistent with the principles of justice and fairness our country is known for throughout the world. We have the reputation as a Nation for dealing fairly in these kinds of matters—and we will do so in this case. We will bring justice to the terrorists, and ensure that the American people can once again live their lives in freedom and without fear.

Thank you.

Chairman LEVIN. Secretary Wolfowitz, thank you. Mr. Haynes, do you have an additional statement?

**STATEMENT OF HON. WILLIAM J. HAYNES II, GENERAL
COUNSEL, DEPARTMENT OF DEFENSE**

Mr. HAYNES. Just a brief one, Mr. Chairman. Chairman Levin, Senator Warner, it is a pleasure to be here again before your committee.

The President's military order to the Secretary of Defense is as serious as any the President gives as Commander in Chief. The Secretary is determined to be deliberate and careful in implementing the order. He has asked me to assist him in framing the issues, surfacing the relative weights of the different considerations that would go into it. He has asked me to work with others to help bring those very important issues, many of which you highlighted in your opening statement, to his attention for his decision.

That is a principal reason for me to be here today, and I'm pleased to be back.

Chairman LEVIN. Thank you both for your opening statements. They are very helpful, indeed.

Senator WARNER. Mr. Chairman, I want to congratulate the Deputy Secretary speaking on behalf of the President and the Secretary of Defense for an excellent, fair, and balanced presentation.

The bottom line is the American people trust our President, and the question now—is Congress going to trust our President to go forward, exercising his constitutional authority with input from Congress, not to write the regulations, but will you receive the recommendations that we wish to make and take them into consideration? Thank you.

Chairman LEVIN. We'll have 8-minute rounds, as I mentioned. We will proceed with the usual early bird approach.

Secretary Wolfowitz, when the Attorney General testified last week before the Senate Judiciary Committee, while, on the whole, he referred most of the details to the Department of Defense on some specific issues, he made statements that I'd like to ask you about and see whether or not you're in agreement with him.

The Attorney General was asked, since the order gives the President or the Secretary of Defense authority to make the final decision, whether or not that means the Secretary of Defense or the President could reverse an acquittal of somebody who is charged with a crime, because by the terms of the order, it could be read that way. The Attorney General said he's confident that was not the intention of the order, and I'm wondering whether you agree with him.

Secretary WOLFOWITZ. It was not the intention of the order.

Chairman LEVIN. Thank you. The Attorney General was asked whether he believed that there should be appellate procedures under the order, other than the President and the Secretary of Defense—in other words, appellate procedures by an outside third party—because the order of the President appears to preclude that. The Attorney General said that he believes the Department of Defense, “has the authority to develop appellate procedures under the order”. I'm wondering whether you agree that you have the authority to establish appellate procedures outside of the chain of command—in other words, outside of the Secretary and the President?

Secretary WOLFOWITZ. Mr. Chairman, I'm going to ask the General Counsel to address the issue of authority, but I believe that it's worth emphasizing very, very strongly here that we are proceeding very deliberately. It is nearly a month now since the President issued that order and, as I believe everyone has observed, he has not yet chosen to designate anyone for trial by these commissions. We are still working on the procedures. We are listening very carefully to a very wide range of views and some very distinguished outsiders, and I won't try to mention everyone, but to give you a sense of—

Chairman LEVIN. I wonder, though, whether you could just address the question, because we're limited in time.

Secretary WOLFOWITZ. OK.

Chairman LEVIN. Do you agree with the Attorney General that—

Secretary WOLFOWITZ. I believe we have the authority.

Chairman LEVIN. Pardon. I'm sorry. You do or do not?

Secretary WOLFOWITZ. I believe we do.

Mr. HAYNES. Mr. Chairman, the President's order specifically does provide for at least some review, because the President reserves the right to review the decision of the tribunal or designates the Secretary of Defense to do so. The order also provides that the record of the proceedings will be reviewed. So another form of that could be in the implementation of that aspect of the President's military order.

If I may go back to the first question that you had about reversal of acquittals, the question, as stated, supposes a particular form of decision-making by the Military War Crimes Tribunal. So the actual procedure for reviewing decisions of the commission is not yet formed.

Chairman LEVIN. I understand that, but I'm wondering whether you agree with the Attorney General that the Department does have authority to develop appellate procedures under the order, outside of the review by the Secretary of Defense and the President? Have you resolved that issue yet?

Mr. HAYNES. We have not resolved the particular form, but the—go ahead.

Chairman LEVIN. The Attorney General told the Judiciary Committee that the tribunals would be subject to habeas corpus review to the same extent as in the Quirin case, that being for review of the constitutionality of the tribunal and whether the defendants were legally subject to the tribunal. But the President's order itself is very explicit. It says that the individual charged "shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly or have any such remedy or proceeding sought on the individual's behalf in any court of the United States or any state thereof."

There seems to be a direct inconsistency here as to whether or not there is habeas corpus review provided, between what the Attorney General said what I believe the Counsel for the President said, and between the order itself.

So my question is, do you agree with the Attorney General? Is the Attorney General right? Or does the order govern the question of habeas corpus review?

Mr. HAYNES. I agree with the Attorney General. The actual order from the President is identical, in that respect, to President's Roosevelt's order. The Supreme Court, in that case, determined that it had jurisdiction to review the case under those circumstances, and there's no intention to change that in this case.

Chairman LEVIN. Alright, thank you.

The Attorney General was asked whether or not only war crimes would be tried by the tribunal, because the order states that the jurisdiction of the tribunals go beyond war crimes, in the words of the order, to "other applicable laws." Just to read a little bit more context, "that individuals that are detained, when tried, will be tried for violations of the laws of war and other applicable laws." But the Attorney General said that only war crimes would be tried by the tribunals, and I'm wondering whether you agree with the Attorney General.

Mr. HAYNES. It's my understanding that the President intends to use this tool, if he does do it, consistent with the tradition of the

use of military commissions, which traditionally has been to try war crimes under the common law of war.

Chairman LEVIN. Only war crimes.

Mr. HAYNES. That's my understanding. Yes, sir.

Chairman LEVIN. Let me go over with you now some of the possible elements of a full and fair hearing. I'd like to just hear from you whether or not you think these elements are part of a full and fair hearing. First, the presumption of innocence. Will there be a presumption of innocence?

Mr. HAYNES. Senator Levin, the Secretary has not made decisions about the individual aspects of the proceedings. There will be some basic procedures that will have to be balanced in context of all the other proceedings. Those elements of due process that are in accordance with the tradition of the use of military commissions will be considered and ultimately decided by the Secretary of Defense.

Chairman LEVIN. In other words, there is still a question as to whether or not, for instance, there's a right to counsel or there's a presumption of innocence, or being informed of the charges against you—are those still unresolved questions?

Mr. HAYNES. Well, no, sir. The President's order says that there shall be a full and fair trial. It clearly says that the accused will have counsel. What is a full and fair trial may involve a number of different issues. But clearly, that is a direct order from the President, and I'm confident that there will be one.

Chairman LEVIN. But I'm trying to conclude by finding out whether or not there's some question as to whether or not, for instance, the presumption of innocence or the right to cross examine witnesses or being informed of the charges against you in a language that you understand—whether or not there's still a question as to whether or not those are guaranteed by the full and fair trial requirement. Is there still a question about those kinds of fundamental issues?

Mr. HAYNES. Until the Secretary makes a decision about the entire bundle of procedures that will be applied, there will be—I would like to reserve the form of that, as opposed to answering specific questions about specific aspects.

Chairman LEVIN. Thank you. Senator Warner.

Senator WARNER. Thank you. Mr. Chairman, I think we should make it clear that on the announcement by the President of his intention to exercise his power under the Constitution to establish these tribunals, you and I discussed the advisability of this hearing and jointly decided that it was definitely a responsibility of this committee, and here we are today. But in the interim, we consulted with Secretary Rumsfeld as well as the Deputy Secretary and others, and the Department of Defense made it eminently clear to the committee that they were in the formative stages of compiling the sets of regulations. Although we're going ahead with the hearing today, we understand we may receive somewhat inconclusive responses at this time.

So I appreciate that, and I understand that, and we must accept the fact that you're midway through the process, and that this committee will eventually have another hearing at which time we'll get

more specific details about what you intend to put into the regulations.

So, therefore, I want to spend some time on procedure as to how you're going about this task given by the President to the Secretary of Defense.

Consultation. We're having our hearing of this committee. The Judiciary Committee of the Senate has had its hearing. Are there other means by which you intend to consult Congress? I presume, although it was directly in your statement, that you will take into consideration the recommendations, not only of the committees of jurisdictions in Congress, this and the Judiciary Committee, but individual members. By what process do you hope to achieve that? Because I think it's important that all 100 members of the Senate feel they've had a voice, if they so desire to exercise it, in the formulation of these regulations.

Secretary WOLFOWITZ. The Secretary has made it clear from the time he was assigned this responsibility that he wanted to proceed very deliberately and very carefully in thinking through all of these issues. He is not a lawyer, but he is determined to get all the best possible range of views that he can.

As I indicated earlier, we're consulting with a wide range of individuals inside and outside the government. We are consulting in a more institutional way with the other branches of government that have views, including the Department of Justice and the Department of State. We welcome the views of the Senate and the House, either institutionally or individually.

Our principal mechanism for getting these views is our General Counsel. I'll let Mr. Haynes speak to that in just a moment. The procedure really is to try to identify all of the issues, including the ones that Senator Levin just raised, to try to get a sense of what the range of recommendations would be, what the range of precedents would be, and, ultimately, to come to some conclusion.

Mr. HAYNES. I'd like to echo the Deputy Secretary's comments. I'd point out that the President issued his order almost a month ago, November 13. In that period, the Judiciary Committee has had four hearings, as I understand it. We've had a number of conversations with individual members of Congress and I solicit your views on a continuing basis.

You can be sure that the views expressed directly and in hearings are being absorbed, factored in, considered, and are deeply appreciated.

Senator WARNER. I think it's important that that point be made in today's record. I've had the opportunity to consult with both of you several times on this, and I want other members of Congress to have the chance to do so as well. This is a very important threshold in the contemporary history of this country, and we want to see this carried out with the proper exercise of the Constitutional authority of the President, as well as Congress.

Now, let's turn to the Department of Justice. It might well be in the course of these procedures that lawyers who are defending or otherwise interested in the tribunals will go the Department of Justice and perhaps institute proceedings in the Federal court system challenging certain aspects of the tribunal process. Therefore, it seems to me that we should have greater clarification today on

the degree to which the Attorney General and his colleagues are being consulted on this, because they may well be the ones in the Federal system to meet the challenges to the tribunal system in the Federal courts.

Mr. HAYNES. Senator, we have had some informal discussions with the Department of Justice and intend to consult them on an ongoing basis.

Senator WARNER. Why do you rest on the word “informal”? I mean, how do you distinguish between formal and informal? Is it a casual call, or are you saying, “Now, Mr. Attorney General, this is what we have?” Are you going to submit your regulations to him before making them public? He’s the President’s chief law enforcement officer.

Now, I don’t suggest in any way that there be an infringement on the right of the Secretary of Defense to conduct these tribunals on behalf of the President, but I think it’s important that it be more than just informal conversation, that we should have some formality to this process with the Justice Department.

Mr. HAYNES. Senator, I did not mean to preclude that. What I will elaborate on at this time is to tell you a little bit about the process that we are employing.

This is a military order. The Secretary is charged with implementing it. What we are doing within the Department is—in short, I have convened a panel of the senior lawyers in the Department, including those who are charged with administering the military justice system, which, as Senator Levin points out, in its usual form is very different from a military commission. Nevertheless, they have very important views and experiences and institutional records and understandings to draw on in order to surface and consider carefully the issues that Senator Levin raised as well as some other issues, in order to ensure that we get an appropriate cast to this implementation, as opposed to recreating the Article III process. That is not the intention of the President to do.

When I said “informal consultations” with the Department of Justice, there will be more. Certainly the Department of Justice has a deep well of expertise on which to draw. They will, of course, be those charged with defending the procedures if and when they are challenged by any—

Senator WARNER. Whether you call it formal or informal you’re going to submit to the Department of Justice the full final set of regulations for their review?

Mr. HAYNES. Yes, sir. We—

Senator WARNER. Am I correct in that? I’ve been around here a little while in this government. I have seen friction between the departments of the government, and that works against the best interests of our President. We don’t want that to arise in this instance.

Last, I think it very wise that you have consulted with a series of outside experts. You’ve shared with me some details on that. Let’s make it clear that you just haven’t gone to Republicans because this is a Republican administration. It’s across the board. It hasn’t got a thing to do with politics, in my judgment. You have sought out and are receiving the advice and counsel of a wide range of very well recognized and respected former jurists, practic-

ing lawyers, professors, and the like. I'd just like to have that on the record, Mr. Secretary.

Secretary WOLFOWITZ. Absolutely clear, Senator. I mean, we were consulting a wide range of people, and I don't want, by mentioning names, to suggest that these are the only people we're talking to, but just to give you some idea of the caliber of people that the Secretary has met with or that he's had General Counsel meet with, people like former Secretary of Transportation Bill Coleman, former White House General Counsel Lloyd Cutler, a Democrat, former Attorney General Griffin Bell, former FBI Director. Judge William Webster and Professor Lee Meltzer have been consulted. It's people of that caliber, and it's, I think, representative of a very wide range of political opinion.

Senator WARNER. I thank you, Mr. Secretary. I was hopeful that you would put that out to show politics is playing no role whatsoever as we formulate these regulations.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Warner. I'm now going to call on Senator Kennedy. There's a vote on. Many of us are going to want to go and vote and come back. The list of the order of recognition is here. I won't read everybody, but Senator Inhofe, you would be next, but you have to vote, so I'm not sure whether you want to try to do that. But I'm going to turn this now to Senator Kennedy. If you are here when he's done with his 8-minute round, you would be next. If not, when you get back, you should then be recognized.

Senator INHOFE. Mr. Chairman, I'm going to stay, and I'll be here.

Senator KENNEDY. Thank you, Mr. Chairman. Thank you, Mr. Secretary and Mr. Haynes, for the indication that you're open to getting some input as you're working forward in developing this process. I mean, I think it's something that we should try and engage with you on.

Let me go first to one of the areas that I'm concerned about, and that's how other countries will see military tribunals and whether they will look at this as a double standard by the United States.

Over the years, our government has actively supported the rule of law internationally. We've consistently opposed military tribunals in other nations because of their failure to provide the adequate due process. The Department of State's most recent human rights report last February said the following about the use of military courts in Peru: In the case of Laurie Berenson, an American who was tried for terrorism by a secret military tribunal, "Proceedings in these military courts do not meet internationally accepted standards, openness, fairness, due process." It said that Ms. Berenson, in particular, did not receive sufficient guarantees of due process.

This is the criticism that the United States has made about tribunals. We've done that in recent years with Burma, China, Colombia, Egypt, Malaysia, Nigeria, Peru, Russia, the Sudan, Turkey—the list goes on and on. Given the broad scope of the initial military order, even if its narrowed now, isn't there a danger that it'll allow countries to justify secret military tribunals and avoid even the basic due process safeguards? I mean, what is the administration

doing to see that America's credibility in criticizing the secret military tribunals in other countries will not be undermined by the military order?

Secretary WOLFOWITZ. Senator, I think that's one of the reasons why we want to work out, very carefully, the kinds of procedures that will make the judgments of any military tribunal, any military commission that we establish meet a full standard of fairness. We have criticized, for example, the tribunals in Peru for violations of fundamental principles of due process. If we have to judge individuals before a U.S. military tribunal, I think we will be setting a standard by which other countries will have to be judged, and I think that will reinforce our case in objecting to the kinds of abuses that you refer to.

Senator KENNEDY. I think that's right. I think the concern is now with the full and fair hearing, whether we've already opened the door to other countries. Obviously, they'll be influenced by the final recommendations, but has the State Department been involved in the initial declaration or statement about the tribunals themselves? Have they had any input? Has Secretary Powell expressed any views that you know?

Secretary WOLFOWITZ. We are consulting with them also and are clearly interested in their views. The point that Chairman Levin made, that how these tribunals are viewed by other countries may affect their willingness to turn individuals over to us, makes this, among other reasons, a matter of international significance.

Senator KENNEDY. The chairman mentioned some of these protections, but I want to just come back to them, because I do think they define whether these are going to meet our standards: adequate due process; the presumption of innocence; proof beyond a reasonable doubt; representation by independent and effective counsel; the right to examine and challenge evidence offered by the prosecution; the right to present evidence of innocence; right to cross-examine adverse witnesses and to offer witnesses; reasonable rules of evidence; and the appellate review of convictions.

Now, these protections are instituted in our standard of justice, because they help identify the guilty and also protect the innocent. They are not luxuries. They are essential aspects of our whole process of justice. I'm just interested in what you might be able to say or you can't say at this time and when you'll be able to tell us which ones will be in and which ones will be out, in terms of the order.

This is against a background, a statement, where Secretary Rumsfeld a few weeks ago indicated that the procedures may very well be established on the basis of who the individual is and who might actually be tried. I'm interested in coming back to these items, and hearing from you when we will know whether these kinds of protections will be included in the order or whether they will not be and when we might know that.

Mr. HAYNES. Senator, neither the President nor the Secretary has indicated a deadline for when he or they want these rules to be put into effect. But let me just make one observation about your list, which is an important one. As you might imagine, and I'm sure you know, the method by which any one of those principles might be implemented can vary. One of the reasons that the Presi-

dent chose to create this option for himself, this additional tool in the war on terrorism, is to recognize that this is an extraordinarily different risk than we normally take and to recognize that, in a war, law enforcement is not the principal aim. It's winning the war. Now, that doesn't mean it comes at the expense of fairness or of the American ideals or principles of justice. It doesn't come at that expense.

But take the rules of evidence, for example. What the Secretary of Defense will do, and what the President has already done, is maximize the ability to find the truth. The standard of evidence spelled out in the President's military order is to admit that evidence which is probative to a reasonable person. That is different—

Senator KENNEDY. I don't want to interrupt you here, but there's another area that seems to be fairly subjective. My own sense is these are not luxuries which we sort of tolerate when times are good. They are essential aspects of a due-process system and we want to try and we will—I hear your answer that you're not prepared to make these recommendations now, but they will be forthcoming. Obviously, they'll have to before the military tribunals are established.

I'd like to get to what I addressed in my opening comment about the decision to try Zacarias Moussaoui in the Federal district court. Secretary Wolfowitz, if you'd be good enough to tell us, what were the considerations in making the decision to proceed in the Federal court as opposed to a military tribunal?

Secretary WOLFOWITZ. Senator, to the best of my knowledge, that was a decision made by the Justice Department.

Senator KENNEDY. You weren't involved in this?

Secretary WOLFOWITZ. I was not, personally. I don't believe we were as a Department, either, were we?

Mr. HAYNES. No, we were not involved.

Senator KENNEDY. Do you have a view, Mr. Secretary, on that?

Secretary WOLFOWITZ. No, I don't. They obviously have the evidence that they believe gives them a case for going to trial, and I'm not aware—I would have to know the details to have a view.

Senator KENNEDY. My time is up.

Senator INHOFE. Thank you, Mr. Chairman. I think some of the rest of them may be back, and I'm not going to take all of my time because we do have a vote that's on. Let me just ask Mr. Haynes something that was alluded to briefly by Secretary Wolfowitz.

During the Judiciary Committee hearing, when Attorney General Ashcroft was asked some questions, he said, not only will the U.S. Supreme Court review whatever's been done, but he believes that the issue resolved in the court's 1942 decision—referring to that decision where the eight suspected German saboteurs were brought to justice, six of them executed—the question I have would be a legal question. Legally speaking, between the court's decision during a declared state of war in 1942 and its application to our current war on terrorism, is there a legal distinction or difference?

Mr. HAYNES. I do not believe that there is a difference that matters here. We are clearly in a state of war, and we are very confident that the President's orders—

Senator INHOFE. Alright, let me ask another question to either one of you. I've been concerned about one thing. We know that many people will be arrested in conjunction with September 11 by governments of foreign countries. When that happens, we are concerned about extradition. We're concerned about getting them over here. I know there is a concern that some of these countries—I believe it was Spain where they apprehended some individuals—they're reluctant to extradite to this country because of the system of justice they believe we might be using. Is there some kind of a legislative fix, Secretary Wolfowitz, that could make them less reluctant to allow them to come back here for justice?

Secretary WOLFOWITZ. Senator, I think the principal issue that we're going to have with those countries, as we have with Spain, is over the issue of the death penalty. I think in every one of these cases, if there's an issue, we'll have to negotiate. The President is not required to submit anyone to a military tribunal. If that were to become an obstacle to extraditing somebody that was important to us, I'm sure that would be something he would take into account. I think—my feeling would be it's much better to leave him the flexibility than to try and—

Senator INHOFE. That flexibility should encourage them to allow us to have access to those witnesses. At least I hope that's the case.

Secretary WOLFOWITZ. I would hope so. It seems to me, given the horror of what took place on September 11, that they—let's forget about military tribunals—that they owe the—if someone's going to be tried by an American civil court, it is for something—it seems to me, we are fully entitled to have custody of them.

Senator INHOFE. Let me just share a personal experience with you. I almost didn't come today, Mr. Secretary, because I've already made up my mind. I did so a long time ago. But many years ago, when I was in the United States Army, I was a lowly clerk in the military courts.

As this discussion has come forward and all these concerns about beyond reasonable doubt, presumption of innocence, the two-thirds versus unanimity, in terms of the death penalty, the rights and protections of these terrorists—I'm having a very hard time with that, because I remember so vividly sitting in the courtrooms of military justice many years ago as an Army clerk looked into the faces of these men and women, our military people, who were brought to justice. I don't recall one time, not one time, during that time that I spent in those military courts, hearing or remembering, recalling any soldiers who were being administered justice at that time complaining about the system of justice that they were receiving.

I have very strong feelings that if that system of justice was good enough for our own troops, as it's good enough for our own troops today, it's ludicrous to believe that that system is not good enough for a terrorist. So I have no problem with it, and I come with that prejudice from my past experience in the military courts. I hope we'll be able to get on with it.

I guess I'm the chairman, so I'll yield to Senator Allard.

Senator ALLARD. Thank you for yielding. I would ask that my full statement be made a part of the record.

[The prepared statement by of Senator Allard follows:]

PREPARED STATEMENT BY SENATOR WAYNE ALLARD

Thank you Mr. Chairman. I thank you for calling this hearing and bringing the issue of military tribunals here to the Armed Services Committee—where it belongs. The President's order to the military and the Department of Defense on the detention, treatment, and trial of certain non-citizens in the war on terrorism has stirred much debate. Accurate and factual information on the subject has been mixed with information that is fictitious and/or irrelevant. Before the Defense Department has even had a chance to promulgate rules and procedures for them, some have already slandered the military commissions as unconstitutional, even in the face of highly favorable historical and constitutional traditions.

I support the President in his decision. The spectacle of thousands of high-profile U.S. court terrorism trials dragging on for years would be a legal, logistical, security, and safety nightmare. But difficulty is not the reason for the tribunals, nor is cost (although the McVeigh trial alone cost about \$82 million). The President has taken this step to ensure that further acts against the United States—by a group that has already killed thousands of innocent people—are forestalled. The Executive Order, while mandating humane treatment and fair trials, will prevent the disclosure of extremely sensitive security information, minimize the risk to public safety that holding trials in the U.S. would foster, expedite the nullification of threats to our country, and will facilitate the proper settlement for military actions.

The President's order specifically directs that trials before military commissions will be "full and fair," and I have no doubt that this administration will do that and remain well within the bounds of the Constitution. Certainly, oversight by Congress, in particular this committee, is important.

Secretary Wolfowitz and Mr. Haynes, I thank you for coming here today. I look forward to hearing your testimony. In order to defeat terrorism and limit the risk to ourselves and our allies, it is important that we bring terrorists to justice. I agree with the White House Counsel Mr. Gonzales, when he said that, "The American military justice system is the finest in the world, with longstanding traditions of command influence on proceedings, of providing zealous advocacy by competent defense counsel, and of procedural fairness." I am confident that you will continue this tradition.

We are already seeing success in physically dismantling the al Qaeda network and the destruction of their financial backing. But, it is important that we defeat terrorism on all fronts. We are winning the war on the military front, on the economic front, and on the diplomatic front. Bringing terrorists to justice in a fair and just manner is critical in winning the information front and achieving a long term victory that provides security for our citizens at home and while traveling abroad.

Again, thank you for coming here today and I look forward to hearing your testimony.

Senator ALLARD. Secretary Wolfowitz, I want to compliment you on your statement. I think it was a very good statement. I'd point out that a trial by military commission isn't anything new. George Washington used it, and right up to current times it's been in use. It's been endorsed by all three branches of government. I think that's impressive.

I also listened very carefully to the reasons why you felt like we needed to go to a military tribunal. I found two of them very clear and easy to understand. The first one you mentioned was to better protect our civilian judges and jurors from threats from terrorists. I think that's easy to understand. The third one you mentioned was that they allow the use of classified information. I think we all understand how many times our sources get exposed, perhaps, in a public trial. We put them at risk and we lose them—they either get killed or they get disclosed so that they're no use to use any more, from an intelligence gathering purpose.

You talked about how Federal rules of evidence often prevent the introduction of valid factual evidence for public-policy reasons. I tried to think, in my own mind, of where that might apply, and I'd like to have some help. One area that I thought it could apply, for example, would be in a Miranda decision. Police officers or anybody

that's making an arrest carry a little card and promptly read their rights to whoever is being arrested. In this particular case, we frequently have arrests being done by somebody in the military—either a military officer or somebody—men or women serving the military. Certainly, they're not trained in the Miranda decision that, in a practical sense, would never be applied on the field of battle, perhaps not even here in this country.

We have somebody in the National Guard, for example—I can visualize an example in an airport, when somebody might walk on with a body bomb or something like that, and they immediately put him under some kind of arrest or whatever. They're not going to read him his Miranda rights.

I could also see where perhaps chain of evidence would be difficult to apply. I assume these are the kind of situations you're talking about where they would get off in a civilian court or regular judicial courts, but certainly wouldn't apply in a military court. I'd like to have you comment on those examples and then also are there other examples that could be referred to as to why it wouldn't be appropriate to try them in a regular court of law?

Secretary WOLFOWITZ. Another example might be our exclusionary rules that basically make sure that our law enforcement people don't undertake unreasonable search and seizure procedures and, therefore, if evidence is collected in violation of one of those rules, it can't be introduced. I mean, imagine if a foreign terrorist were sneaking into the United States with a trunk-load of anthrax in the back of the car, and the policeman unreasonably opened the trunk and found it. I don't think we'd want that evidence excluded in a trial. That might be a reason why you'd consider a different criminal procedure.

But let me go to something even more fundamental. You're absolutely right that we don't train our special forces in Miranda rules. But it isn't only that they're not trained to do it. This comes to the fundamental point. They are trained to do the opposite. They are trained to take these people and to question them and to get as much information as quickly as possible because it is part of the defense of the United States. The information that the people they arrest know about may help us to catch other terrorists, may help us to prevent other terrorist incidents. Therefore, the last thing we would want is to be picking up al Qaeda terrorist in Afghanistan today and reading them their Miranda rights. We want them to tell us everything they know. Now, after they've told us all of that, we're going to say it can't be introduced in a trial?

What we're trying to accomplish here is two goals, and I think we can accomplish both of them. One is the defense of the United States. The second is a full and fair trial. But the defense of the United States is fundamental in all of this.

I would add one other thing. I believe the existence of this procedure, the possibility of military commissions, even without anyone having been turned over, even without the procedures having been specified, is something of a deterrent to people, for example, sneaking into the United States thinking—and there's some evidence that among many things terrorists have studied rules of civil procedure when learning how to operate in this country—to put them on notice that you may be in a completely different process. Don't

count on Miranda rights if you're arrested if you're a foreign terrorist sneaking into the United States.

Senator ALLARD. What I've seen is the disclosure of a lot of their procedure manuals, and they specifically talk about how they can avoid prosecution, perhaps using our own civil courts. Is that correct?

Secretary WOLFOWITZ. That's my understanding. I haven't actually seen those manuals, but I've heard about them. Yes, sir.

Senator ALLARD. Okay. If you go into a trial by military commission, who provides the defense counsel?

Secretary WOLFOWITZ. I'll turn to my lawyer, but I think that's one of the questions we're looking at.

Mr. HAYNES. That is one of the questions that we're looking at. The President's order provides that they shall be afforded counsel. One would expect that we would provide military counsel for them, as this is a military proceeding. But as I said to Senator Kennedy earlier, there are many different possible permutations of that procedure, and that needs to be determined.

I might add, regarding your first question, that there are other types of evidence that might otherwise be excluded in a normal criminal proceeding in a U.S. Federal court that, nevertheless, would be valuable in weighing the facts—in order to get at the truth, in other words. For example, remote testimony, affidavits, recorded testimony. There may be witnesses who, for very good reasons, can't be identified. Now, in a normal proceeding, those might not be allowed in at all, for good reasons, for reasons that ensure that we have a fair process that works for another two-hundred-and-some-odd years that the country's been working. Those are prophylactic reasons, reasons that we have decided are good for the overall administration of justice on an ongoing basis, that may not have any application in this context, a war that we hope is not a long one, although we fear that it is. But there may be evidence like that that should be considered and will have to be weighed based on the value of it, as determined by the triers of fact.

Senator ALLARD. Now, these are non-citizens that you're talking about. These aren't American citizens. I think that ought to be clarified for the record. So if you have a non-citizen arrest in a foreign country, then the thought is that the military commission or tribunal would probably not be conducted in this country. Is that correct?

Secretary WOLFOWITZ. Sorry to keep giving you the same answer, but that is one of the issues that clearly remains open and might be decided depending on the individual case, as well. I think it depends on what foreign country we find him in and what the options are for trial, but they would certainly not necessarily have to be brought back here for trial. As I noted in my opening testimony, the very large number of German and Japanese soldiers that were tried before military commissions at the end of World War II were obviously not tried in this country.

One can't say it often enough. We say it over and over again. These commissions are only for non-citizens who are accused of terrorist acts against the United States.

Senator ALLARD. I appreciate you clarifying that. That's been my understanding, that it would apply only to non-citizens.

Mr. Chairman—I guess Senator Lieberman's acting as chair—I see that my time has expired.

Senator LIEBERMAN. Thank you, Senator Allard.

Senator REED.

Senator REED. Thank you very much, Senator. Thank you, Mr. Secretary and Mr. Haynes, for your testimony this morning.

At this juncture, it appears that there is the constitutional right to conduct these tribunals. Our issue is making sure we get that right correct, with appropriate procedures in place so that there's both a procedural fairness and substantive fairness.

Let me ask a few questions. I'm going to try to divide up the questions—the legal questions to Mr. Haynes, the policy questions for the Secretary.

Mr. Haynes, in response to Chairman Levin, you indicated, or at least implied, that there would be a right of habeas corpus review under the Quirin case. But there was a subsequent case in which the Supreme Court decided that an alien outside the United States did not necessarily have the right to habeas corpus review. That was Johnson versus Eisentrager. Are you aware of that case, and in what way will that inform your decision about the process of review?

Mr. HAYNES. Perhaps I wasn't as precise as I should have been. What I was responding to, or thought I was responding to, was trial in the United States. I stand corrected if I mis-spoke earlier.

Senator REED. Well, it's most likely that, in the most controversial cases, the individuals will not be returned to the United States. In that case, your view would be that those individuals have no right to a writ of habeas corpus?

Mr. HAYNES. That's my view.

Senator REED. That, I assume, would put additional emphasis on other rights of appeal within the Department of Defense. Is that a fair deduction? Or would you conclude, at this point, that if someone's tried overseas, there will be a right to appeal the verdict of a court?

Mr. HAYNES. Well, again, the Secretary hasn't decided on what the procedures will say yet. The order itself does include within it a review above the tribunal itself, so there will be, automatically, at least that appeal. What additional procedures the Secretary decides to employ remain to be seen.

Senator REED. Again, I don't want to keep emphasizing this, but it's a fundamental right of habeas corpus. It's a right which the court recognizes is available to someone tried by a military tribunal within the United States. But simply a decision administratively not to try the person in the United States could render that right to habeas corpus moot, so it seems to me that this is an issue that you have to devote yourself to rather seriously in terms of some procedures to review cases.

Mr. HAYNES. We are being very serious. But I point out that in your hypothetical we are talking about—non-U.S. citizens outside the United States. The Constitution does not give those individuals anywhere near the rights that U.S. citizens have.

Senator REED. I'm not arguing with you, but you have the authority under this law to bring the individual to the United States for trial, which would trigger habeas corpus review, or keep him

outside the United States. I think you have to be very careful in procedures so that doesn't appear to be an arbitrary denial of a right which would be available to the alien if he was tried in the United States. Is that a fair point?

Mr. HAYNES. I take your point that we should be serious, and we are, and we would solicit more views from you after the——

Senator REED. Let me ask another question. In the order, at page five, it talks about the prosecution conducted by attorneys designated by the Secretary of Defense and "conduct of defense by attorneys for the individual." Do you contemplate—and you might have covered this in your previous questioning—that the individual may select the attorney of his choice or her choice?

Mr. HAYNES. It may be that the Secretary decides to address the right to counsel in a number of different ways. One option could be to provide military counsel or other counsel to them. The extent of choice remains to be seen. The Secretary will have to consider what qualifications are going to be important in order to provide effective counsel. This is an important and fundamental tenet of our American system, and whatever counsel is provided will be competent and a strong advocate and qualified in all respects, including the need to protect information and——

Senator REED. Well, there are several ways to do that. The first is to establish general criteria—must be a member of a bar in a jurisdiction of the United States, etcetera. The other way is to specifically reject suggestions by the defendant of who would represent the defendant, even though they meet this criteria. Do you believe the Secretary of Defense would deny individual choices by a defendant of defense counsel who is otherwise qualified?

Mr. HAYNES. I could imagine some circumstances where counsel chosen by the defendant might not be appropriate under the circumstances, so, yes, I can imagine that circumstance.

Senator REED. That decision would be made by the Secretary of Defense.

Mr. HAYNES. In the implementation of the procedures implementing the order, the Secretary will include rules about qualifications of counsel, both defense and prosecution.

Senator REED. Well, it's quite clear. The order says that the prosecution attorney will be designated by the Secretary of Defense. But what you're suggesting by your comment is that the order should be further read to imply that the defense counsel might also be selected by the Secretary of Defense.

Mr. HAYNES. There's another provision of the order that I can give you later if you'd like that says the Secretary shall prescribe rules for the qualifications of counsel, both prosecution and defense.

[The information referred to follows:]

Pertinent language from the President's Military Order of November 13, 2001, as well as Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002, are provided as an appendix to this testimony.

APPENDIX

The President's Military Order of November 13, 2001, states in pertinent part:

"Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

...

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for –

...

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;"

Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002, states in pertinent part:

"4. COMMISSION PERSONNEL

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor, and, as appropriate,

one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. ...

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, and shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel").

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A).
...

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. ...

Senator REED. What level of rank do you contemplate the military judges to be?

Mr. HAYNES. That's not been determined. This would clearly be an important factor to consider. The qualifications of the commission members or judges, as you say, is certainly very important. In the past it has ranged, depending on the level of the offense charged, the quantity of the cases, and the individual accused. I could imagine a whole range of possibilities.

Senator REED. In a technical sense, the convening authority would be the Secretary of Defense? The Secretary of Defense would choose the judges?

Mr. HAYNES. One of the issues is whether the Secretary would make that determination himself or whether he might identify different subordinate appointing authorities. That has been done different ways in different times over the years, as well. There might be some utility to that.

Senator REED. Let me ask another more general question. It's my understanding that bin Laden has been indicted in a Federal court in New York for the bombings of our embassies. Yet, as I read the order, the present order would essentially disregard any existing indictments by Federal courts and vest exclusive jurisdictions in these military tribunals to those individuals that he has identified as being subject to this war. Is that a correct understanding?

Mr. HAYNES. I don't think so. I don't think that the order is intended to divest the Article III Courts of jurisdiction. It is a separate and concurrent option for trial under these cases. Of course, it would require the President to make a specific written determination. In the case of bin Laden, as you say—

Senator REED. But that raises the question of competitive venues or jurisdictions for this trial, at least in the case of bin Laden. An indictment is pending in a Federal court, an Article III Court in the United States, versus the President's decision unilaterally under this order to essentially ignore the indictment in the Federal court. I think it's a real issue. I don't have an answer, but I think it's a real issue.

Mr. HAYNES. Well, it's not an unusual circumstance. For example, one could be indicted in state court and Federal court at the same time. The fact that there are different potential forums for trial or adjudication is not problematic.

Senator REED. My time has expired, but just one final point, and I'm a good enough lawyer to know I don't know the answer. As I understand it, though, if there's no agreement between the state court and the Federal court, both have at least the authority to conduct the trials. I mean, perhaps I'm wrong. Thank you.

Chairman LEVIN. Thank you very much. Senator Sessions.

Senator SESSION. Thank you, Mr. Chairman. First, Mr. Chairman, I'd like to submit for the record a number of items from experts in constitutional and international law that have affirmed the military commissions as President Bush has proposed it. First is a letter from the former Attorney General of Alabama, Bill Baxley, who's a Democratic Attorney General, was a JAG officer in the National Guard for many years, has tried cases before military tribunals, and said he probably is the only person in Alabama that's read the entire Nuremberg transcript. He believes this is a proper and appropriate way to proceed, as does Dean Doug Kmiec, of Catholic University, Professor Ruth Wedgwood of Yale, a widely acknowledged international law expert, and Gen. Michael Nordotti, a former top JAG officer in the Army.

[The information referred to follows:]

Mr. Chairman: I submit for the record the following items from experts in the field of constitutional, international, and military law, all of whom have studied President Bush's Military Commissions Order and who support it:

1. The written statement of retired Gen. Michael Nardotti, the former top JAG officer of the U.S. Army;
2. An op-ed by Professor Ruth Wedgwood of Yale a widely acknowledged international law expert;
3. A statement by Dean Doug Kmiec of the Catholic University Law School, and former Assistant Attorney General for the Office of Legal Counsel; and
4. A letter from former Attorney General of Alabama, Bill Baxley, who has tried cases before military tribunals and read the entire Nuremberg transcript, and lectured on the Nuremberg transcript, and lectured on the Nuremberg International Military Tribunal.

ITEM 1

**STATEMENT OF MAJOR GENERAL MICHAEL J. NARDOTTI, JR.,
UNITED STATES ARMY, RETIRED
THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1993-1997**

**BEFORE THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
“MILITARY COMMISSIONS” HEARING - DECEMBER 4, 2001**

Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to contribute to this important dialogue. The possible use of military commissions, as ordered by the President in his role as Commander-in-Chief of our Armed Forces, to conduct trials of non-United States citizens for violations of the law of war as described in the Military Order of November 13, 2001, concerning the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” is an extraordinary measure in response to extraordinary events. Careful explanation of the justification and basis for this proposed action and related actions which will follow, certainly will inform the vigorous public debate. To assist in this effort, I have been asked to highlight and discuss some of similarities and differences between the prosecution of criminal matters in our Armed Forces in courts-martial under the Uniform Code of Military Justice and those matters prosecuted in Article III Federal courts. Further, I have been asked to relate these similarities and differences to military commissions as some of those tribunals have been conducted in the past and may be conducted in the future under the President’s Order.

Background

As a matter of background, I am a veteran of over twenty-eight active duty in the United States Army. Early in my career, I served as an infantry platoon leader in combat in Vietnam, and, later, in a variety of positions in the United States and overseas as a soldier and lawyer. I served as The Judge Advocate General of the Army from 1993 until my retirement in 1997. Since that time, I have been in the private practice of law in Washington, DC.

The President's Proposed Use of Military Commissions

Before describing the issues which will be the primary focus of my statement, I should make clear my view of the President's proposed use of military commissions to non-citizens who planned, perpetrated, or aided and abetted the attacks of September 11. Without restating the arguments previously made to this Committee in support of the President. I agree with those who believe the President, as Commander-in-Chief, has the authority under the Constitution to take these actions. The terrorist acts of the organization known as al Qaida, up to and including the horrendous attacks of September 11, 2001, leave no doubt that the United States is in a state of armed conflict with an outside enemy and that the President is most certainly correct in his conclusion that "an extraordinary emergency exists for national defense purposes." The Joint Resolution of the Senate and House of Representatives underscores this conclusion and supports the need for extraordinary action in authorizing the President, "to use all necessary means and appropriate force" against those who planned and perpetrated these acts to prevent them from committing future terrorist acts.

The use of military commissions under these circumstances is a lawful means available to the President, as Commander-in-Chief, to achieve this end. The justification for the use of military commissions is well-established in international law and the use of tribunals of this type has a lengthy history in times of extraordinary emergency in our country. Congress has recognized and affirmed their use, previously in the Articles of War, and currently in Articles 21 and 36 of the Uniform Code of Military Justice. The United States Supreme Court upheld the constitutionality of trial by military commissions of enemy saboteurs caught within the United States during World War II in *Ex Parte Quirin*, 317 U.S. 1 (1942). The Court's reasoning in that case with respect to the lawfulness of trying unlawful combatants – those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war – would appear to be particularly applicable to those who planned, perpetrated, or aided and abetted the attacks of September 11 – acts of monumental and extreme violence against thousands of our civilian citizens.

The more debatable and critical issue may well be how the President chooses to exercise this option. The *Quirin* model is relevant to an extent, but it does not necessarily provide all the answers for a similar undertaking today. The Military Order of November 13, 2001, raises important issues which will need further clarification, and Administration officials have already begun to clarify some of those points. They have stressed repeatedly that the specifics of the rules to be applicable to military commissions in this instance are still under development and review by the Department of Defense. The President, nevertheless, has made certain basic requirements clear, including that there be

a full and fair trial. The determination of what constitutes a full and fair trial under these circumstances should include particularly careful consideration to the extraordinary circumstances which justify the use of and compel the need for military commissions in this instance. Further, the significant evolution in the administration military justice since the *Quirin* decision and the extent to which that evolution should impact on the conduct of military commissions today also should be carefully considered.

The Unique Need for the Military Justice System

Before focusing on military commissions, I will explain, as a starting point, why there are differences between criminal prosecutions in Article III Federal courts and criminal prosecutions in the Armed Forces. Congress and the courts have long-recognized that the need for a disciplined and combat ready armed force mandates a separate system of justice for the military. Our Armed Forces operate world-wide in a variety of difficult and demanding circumstances which have no parallel in the civilian community. Military commanders of all services are responsible for mission accomplishment and the welfare of their troops. In the most difficult operational and training situations, they make decisions that can and do put the lives of their troops at risk. These commanders also are responsible for administering a full range of discipline to ensure a safe and efficient environment in which their troops must serve. They are able to accomplish this goal through the use of military law, the purpose of which, as stated in the Preamble to the Manual for Courts-Martial United States (2000 Edition), is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national

security of the United States.” The range of disciplinary options and circumstances under which commanders be able to employ them simply make resort to alternatives in the civilian community, whether through the Federal courts or other means, an unworkable and unrealistic option.

In recognition of this fact, Congress, acting under its Constitutional authority “To make Rules for the Government and regulation of the land and naval Forces,” enacted the Uniform Code of Military Justice (UCMJ) in 1950 to set forth the substantive and procedural laws governing the Military Justice System. Congress enacted the UCMJ to make “uniform” what previously was not -- the criminal law applicable to all the Military Services. Substantive law is contained in the various punitive articles which define crimes under the UCMJ. While Congress defines crimes, the President establishes the procedural rules and punishment for violation of crimes. The President’s rules are set forth in the Manual for Courts-Martial. The Manual is reviewed annually to ensure it fulfills its fundamental purpose as a comprehensive body of law.¹

¹ The UCMJ establishes three levels of military courts: (1) Courts-martial are the trial level courts. General courts-martial are the forums in which felony offenses are prosecuted. Lower level special and summary courts-martial have jurisdiction to try most offenses but are limited in the punishments which they may impose; (2) Four Courts of Criminal Appeals (Army, Navy/Marine Corp, Air force, and Coast Guard) provide the first appellate review which is automatic in cases in which the sentence adjudged includes confinement of one-year or more or a punitive (Bad Conduct or Dishonorable) discharge; and (3) The United States Court of Appeals for the Armed Forces is the highest military appellate court. The five judges of this court are appointed by the President, with the advice and consent of the Senate, and serve for a term of 15 years. Decisions by this court are subject to review by the Supreme Court by a writ of certiorari.

Article III Federal Courts Prosecutions and Courts-Martial

A Comparison of Certain Rights , Practices, and Procedures

The administration of military justice under these authorities, by Congressional and Presidential design, is, by necessity, different in some respects from the civilian counterpart, but in other respects is similar. Several examples of differences and similarities in the pretrial, trial, and post-trial phases are the following: (1) Rights warnings against self-incrimination in the military are broader than those required in the civilian community and actually predated the requirement of the *Miranda* decision by many years. Rights advisement in the military is and has been mandated whether or not the interrogation occurs in a custodial session; (2) Right to counsel in the pretrial and trial phases in the military is broader than in the civilian community where counsel is appointed if the accused is indigent. Military counsel is provided regardless of ability to pay. Individually requested military counsel also may be provided if available. Civilian counsel may be appointed as well at the servicemembers own expense; (3) In the pretrial investigation phase for felony prosecutions in the military, there is not the equivalent of a secret grand jury in which the defendant has no right to be present. An investigative hearing, which is routinely open, is conducted under Article 32 of the UCMJ to determine whether there are reasonable grounds to believe the accused servicemember committed the offense alleged. The accused servicemember has the right to be advised in writing of the charges, to attend the hearing with counsel, to examine the government's evidence, to cross examine witnesses, to produce witnesses, and to present evidence; (4) Pretrial discovery in the military is similar to that followed in federal criminal

proceedings, but more broad. The government is required to disclose any evidence it will use in the sentencing phase of the proceeding if there is a conviction, or evidence that tends to negate the degree of guilt or reduce the punishment; (5) Unlawful command influence—an attempt by superior military authority to influence the outcome of a proceeding – is prohibited and is subject to criminal sanctions. There is no equivalent issue in federal proceedings; (6) In federal prosecutions a jury of peers is selected at random. General courts-martial must have at least five members selected, as required by Article 25 of the UCMJ, based on “age, education, training, experience, length of service, and judicial temperament.” Civilian jury and military court-martial panel members may be challenged for cause or peremptorily; (7) With respect to trial evidence, the rules in both forums – the Federal Rules of Evidence in federal courts and the Military Rules of Evidence in courts-martial are almost identical. New Federal Rules of Evidence automatically become new Military Rules of evidence unless the President takes contrary action within 18 months; (8) The burden of proof for conviction in both forums is beyond a reasonable doubt; (9) For conviction or acquittal in federal prosecutions jurors must be unanimous. Otherwise, a hung jury results and the defendant may be retried. In courts-martial, except in capital cases, two-thirds of the panel must agree to convict. The first vote is binding. If more than one-third of the panel vote to acquit, then there is an acquittal. A hung jury and retrial on that basis is not possible in the military. In capital cases in courts-martial, a unanimous verdict is required for conviction; (10) Sentencing in federal courts is done by the judge alone, and sentencing guidelines for minimum and maximum sentences apply. In courts-martial, sentencing is decided by the court-martial panel members or by the military judge (if the accused

servicemember chose to be tried by a military judge alone). There are maximum sentence limitations but no minimums. The accused servicemember is entitled to present evidence in extenuation and mitigation, including the testimony of witnesses on his or her behalf, and may make a sworn or unsworn statement for the court-martial's consideration. Two-thirds of the panel must agree for sentences of less than 10 years. Three-quarters of the panel must agree for sentences of 10 years or more. To impose capital punishment, the panel must unanimously agree to the findings of guilt, must unanimously agree to the existence of an "aggravating factor" required for a capital sentence, and must unanimously agree on the sentence of death. Capital punishment may not be imposed by a military judge alone; (11) In federal prosecutions, appeal is permissible, but mandatory in cases of capital punishment. There are two levels of appeal – the Circuit Courts of Appeal and the United States Supreme Court. In the military, appeal is automatic for sentences which include confinement of one year or more or a punitive (Bad Conduct or Dishonorable) discharge. There are three levels of appeal – the Courts of Criminal Appeals of the military services, the Court of Appeals of the Armed Forces, and the United States Supreme Court. Sentences which do not require automatic appeal may be appealed to the Judge Advocate General of the convicted member's service; (12) Appellate representation in federal prosecutions is provided if the convicted person is indigent. In the military, appellate representation is provided in all cases regardless of financial status.

This comparison of the relative handling of pretrial, trial, and post-trial matters, respectively, in Article III Federal courts and courts-martial is not exhaustive. It

demonstrates, however, that even in accommodating the needs unique to the administration of military justice, courts-martial, in many important respects, compare very favorably, even though not identically, to process and procedures accorded in the Article III federal courts.

Courts-Martial and Military Commissions

Just as there are sound reasons for differences in rights, practices, and procedures between Article III Federal courts and courts-martial, there also are sound reasons for differences between courts-martial and military commissions. Courts-martial and military commissions, of course, are not one in the same. Courts-martial are the criminal judicial forums in which members of our Armed Forces are prosecuted for criminal offenses, the vast majority of which are defined in the Uniform Code of Military Justice. Congress and the President have given continuing attention to the development and growth of the Military Justice System to ensure that in seeking to achieve “good order and discipline in the armed forces [and] to promote efficiency and effectiveness in the military establishment,” justice is also served in the fair treatment of soldiers, sailors, airmen, and marines.

Military Commissions serve a distinctly different purpose and have been used selectively in extraordinary circumstances to try enemy soldiers and unlawful combatants, among others, for violations of the laws of war. In the case of unlawful combatants – those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war – their actions and conduct

determine their status and the type of action which may be taken against them as a result. Those who entered our country surreptitiously and who planned, perpetrated, or aided and abetted the attacks of September 11, causing death and destruction on an unprecedented scale, engaged in an armed attack on the United States in violation of customary international law. Their actions and offenses under the law of war allow them to be treated differently from lawful combatants and others who violate the criminal law.

Military commissions are the appropriate forum for dealing with these unlawful combatants. To reiterate the earlier-stated justifications, the use of military commissions is supported by international law, there is lengthy historical precedent for their use, the United States Supreme Court has upheld their use in similar circumstances, Congress has recognized and affirmed their use in the Uniform Code of Military Justice and in the predecessor Articles of War, and the extraordinary emergency which the President has declared and Congress' support to the President in its Joint Resolution authorizing him "to use all necessary means and appropriate force" where there have been egregious violations of the law of war all compellingly support this conclusion.

The question of the rules and procedures to apply remains, nevertheless. While the President has determined that, "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," the appropriate principles and rules of procedures prescribed for courts-martial may still serve as a useful guide. The propriety of these principles and rules should be measured against the legitimate

concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in the course of a military operation rather than through traditional law enforcement means. Further, the principles and rules adopted also should take into account the evolution, growth, and improvement in the administration of criminal justice, in general, and of military justice, in particular, in determining the standards to apply with respect to the most compelling issues, such as those relating to the imposition of capital punishment.

I am confident that the President and the Department of Defense are mindful of the exceptional significance of these issues, and that they will take them into careful account as further decisions are made.

ITEM 2

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The Case for Military Tribunals

By Ruth Wedgwood

U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.

The president's executive order, providing for the detention and possible trial of terrorists in military courts, recognizes this. But some critics continue to argue that trials are better held in a federal district court, or in an ad hoc international criminal tribunal. Others have worried that the initial jurisdictional order does not fully specify the rules of trial (Publication page references are not available for this document.)

procedure and evidence that would await prisoners. Yet others are concerned that Congress was not asked for authorizing legislation. These criticisms, though made in good faith, reflect a misunderstanding of how the law of war is enforced, as well as a dangerous naivete about the threat we face.

The detention of combatants is a traditional prerogative of war. We have all seen movies about captured soldiers in World War II. After surrender or capture, a soldier can be parked for the rest of the war, in humane conditions,

to prevent him from returning to the fight. His detention does not depend on being charged with a crime. Though most al Qaeda members do not rise even to the level of POWs -- they have trampled on the qualifying rules of wearing distinctive insignia and observing the laws of war -- they can be detained by the same authority for the duration of the conflict.

Military courts are the traditional venue for enforcing violations of the law of war. The Sept. 11 murder of 4,000 civilians was an act of war, as recognized by the U.N. Security Council in two resolutions endorsing America's right to use force in self-defense. Osama bin Laden and his airborne henchmen disregarded two fundamental principles of morality and law in war -- never deliberately attack civilians, and never seek disproportionate damage to civilians in pursuit of another objective. The choice to carry out the attacks (Publication page references are not available for this document.) during the morning rush hour reveals this to be a war crime of historic magnitude.

Why not try al Qaeda members in Article III federal courts, with a civilian judge and a jury? Federal judges have never been involved in the detention of POWs or unprivileged combatants. Only in 1996 did federal courts gain limited statutory jurisdiction to hear war crimes matters, and no federal court has ever heard such a case.

Moreover, just consider the logistics. It is hard to imagine assigning three carloads of federal marshals, rotated every two weeks, to protect each juror for the rest of his life. An al Qaeda member trained in surveillance can easily follow jurors home, even when their names are kept anonymous. Perhaps it is only coincidence that the World Trade Center towers toppled the day before al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies -- in a federal courthouse in lower Manhattan six blocks away. But certainly before Sept. 11 no one imagined the gargantuan appetite for violence and revenge that bin Laden has since exhibited. Endangering America's cities with a repeat performance is a foolish act.

If there are a sizeable number of al Qaeda captures, the sheer volume will

also be disabling. At a rate of (at most) 12 defendants per trial, trying 700 al Qaeda members would take upwards of 50 judges, sequestered in numerous courthouses around the country.

In federal court, as well, there are severe limitations on what evidence can be heard by a jury. Hearsay statements of probative value, admissible in military commissions, European criminal courts and international courts, cannot be considered in a trial by jury. Historically, Anglo-American juries were thought incapable of weighing out-of-court statements, and the Supreme Court attached many of these jury rules to the Constitution. So bin Laden's telephone call to his mother, telling her that "something big" was imminent, could not be entered into evidence if the source of information was his mother's best friend. In a terrorist trial, there are few eyewitnesses willing to testify, because conspiracy cells are compartmentalized, and witnesses fear revenge.

There is also the problem of publishing information to the world, and to al Qaeda, through an open trial record. As Churchill said, your enemy shouldn't know how you have penetrated his operations. The 1980 Classified Information Procedures Act helped to handle classified secrets at trial, but doesn't permit closing the trial or the protection of equally sensitive unclassified operational information.

An international tribunal is even less practical. The ad hoc criminal tribunals created for Yugoslavia and Rwanda by the U.N. Security Council have not enjoyed the confidence of Western powers in obtaining intelligence intercepts for use at trial. Americans could not expect to fill the majority of slots in an ad hoc tribunal, and a trial chamber of three to five judges might have no Americans at all. Moreover, the tribunal for Yugoslavia has operated at a snail's pace, trying only 31 defendants in eight years, at a cost of \$400 million.

It is even more fanciful to propose that a largely Muslim court should be delegated to try bin Laden and company. Arab and Muslim states will fear the reaction of their own local militants. And Israel might properly wonder why it could not also serve on such an international court, since bin Laden's fatwa called for the murder of Jews and Americans. No Arab state would participate, of course, if an Israeli judge served. This does not preclude offering into evidence, at a military tribunal, the works of international law by Muslim jurists that show that the standards of protecting innocents are universal.

Congress will want to consult on the nature of the military tribunals established by President Bush. Congress's input will be useful to the (Publication page references are not available for this document.) administration in crafting rules of procedure and evidence, as well as in thinking about added safeguards for alleged terrorists discovered within the U.S. Civilian judges can serve on military tribunals (civilians served at Nuremberg), and few hearings may be closed, except for sensitive portions. Habeas corpus review remains available for aliens arrested in the U.S.

But it is also plain that Congress long ago agreed to the president's power to convene military commissions (under U.S. Code, Title 10, Section 821). In addition, the president has inherent constitutional power as commander-in-chief to convene such tribunals, an argument acknowledged by Chief Justice Harlan Fiske Stone in a 1942 opinion. (Stone, writing for a unanimous Supreme Court, declined to set aside the military trial and execution of German saboteurs who had entered the U.S. to destroy war plants.) The president is also authorized by statute to write rules of procedure and proof for military commissions, and to decide whether or not it is "practicable" to adopt the ordinary rules of common law and evidence.

The thought of printing stationery for the "United States district court for the district of Afghanistan" sounds rather absurd. And for good reason. This danger is too serious to be left to the civilian courts.

Ms. Wedgwood, a former federal prosecutor, is a professor of international law at Yale and Johns Hopkins University.

ITEM 3

The Catholic University of America
School of Law
Washington, D.C.

December 3, 2001

Douglas W. Kmiec
Dean & St. Thomas More Professor of Law

Committee on the Judiciary
of the United States Senate
Attention: The Honorable Orrin Hatch
Washington, D.C.

Re: "DOJ OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING
AGAINST TERRORISM"

Dear Senator Hatch and Members of the Committee on the Judiciary:

I am pleased to respond to your request for my views regarding the issue of military tribunals and other measures that the Attorney General has undertaken to pursue the war against terrorism. As you know, it was my privilege to serve as head of the Office of Legal Counsel in the Reagan and first Bush administrations.

We are at War

First, this is a war. The bloodshed that stains our National integrity in New York, Washington DC and Pennsylvania can be little else – actually and constitutionally. It is declared by some, most notably my friend and constitutional law colleague, Professor Laurence Tribe of Harvard, that Congress' joint resolution of force in response to the September 11 attacks upon our sovereignty and thousands of innocent Americans does not possess "the ritualistic solemnity of a declaration of war." It is not clear what this means, however, even to Professor Tribe since he later admits in the same commentary that "we are engaged in a real war, not a metaphorical one akin to the 'wars' on drugs or poverty." In this latter sense, he is of course entirely correct – there is nothing artificial about the grievous loss of innocent life already suffered, or threatened to be inflicted again, by terrorists who want nothing less than the destruction of America, herself.

Military Tribunals are fully Constitutional

To put an end to the constitutional speculation, it is necessary to remember that war has been declared only five times by the Congress (the War of 1812, the Mexican American War of 1848, the Spanish American War of 1898, and World War I and World War II), while the U.S. military has been engaged in hundreds of military campaigns, including, of course, Korea,

Vietnam, and the Persian Gulf without such formal declarations. In passing joint resolutions supporting these larger number of military campaigns, including the present one, it is abundantly clear that the President is entitled to exercise the full authority of the Commander in Chief, including the authority to create military commissions for the purpose of trying unlawful belligerents. As long ago as 1801 in *Talbot v. Seeman*, Chief Justice Marshall held that: “Congress may authorize general hostilities . . . or partial [war], in which case the laws of war, so far as they actually apply to our situation, must be noticed.”

Congress has authorized the President’s Actions

Justice Jackson once observed as well that the President’s foreign affairs authority is at its zenith when Congress and the President have acted together. Given the joint resolution of force, the congressional appropriations in support of the Afghanistan campaign, the provisions of Title 10 which authorize the President to convene military commissions outside the normal rules of procedure and evidence, it would be fatuous to suggest that the President lacks authority to undertake the military order issued.

The American Civil Liberties Union nevertheless immediately decries this logical, and entirely constitutional, exercise of war power as “deeply disturbing” and in contravention of ideas “central to our democracy.” In fact, as just observed, the President’s order is well-grounded upon constitutional text, statute and past practice, and is more likely to preserve civil liberty than to undermine it.

Ordinary Criminal Courts Fail to Accomplish Our Military Objectives

Terrorism is not garden-variety crime within an ordered society. It is the indiscriminate killing of civilian innocents and destruction of civilian property. As such, it is the quintessential crime against humanity, rather than a social or cultural dysfunction capable of rehabilitation or rectification by means of ordinary law enforcement and prosecution.

Past experience with attempting to try terrorist acts within the regular criminal justice system has been unsatisfactory largely because standards of proof and rules of evidence entirely appropriate to peacetime are ill-suited to the effective punishment and deterrence of terrorist act. Presumed innocence, proof beyond a reasonable doubt and Miranda rights and privileges against self-incrimination all make sense when the delicate balance of citizen right is being balanced against societal interests in confining the use of force by authority. However, when a the Congress has authorized a President to respond to unprovoked attack with all necessary force to events like those of September 11 and “any future act” of international terrorism, the state of war intends the balance to be different.

The standard applied in military tribunals is simple and pragmatic. If those perpetuating war crimes are not disposed of upon the field of battle, military tribunals may be empowered to ascertain with evidence that is “probative to a reasonable man” – that is, more probable than not.

What the tribunals seek to ascertain is whether a given person or organization has committed what Sir Edward Coke called centuries ago, a crime against humanity. In other words, the type of crime only committed by the enemies of mankind.

Practically, this will mean neither the hearsay rule (which has bedeviled prior terrorist trials in federal court because of the disappearance or unreachability of direct witnesses) nor ill-fitting exclusionary rules that have no deterrence-based relevance to this setting would derail the admission of evidence obtained under the noncoercive interrogation authorized by the President's order. The President has specifically provided as well that this humane treatment be afforded "without any adverse distinction based on race, color, religion, gender, birth, wealth, or similar criteria." ACLU charges of "racial and ethnic profiling" thus find no support within the scope of the President's own directive.

A Full and Fair Trial Will Be Provided

As in past cases, the actual composition and procedures of these tribunals – which can sit either in the United States or elsewhere – are left to be determined by the Secretary of Defense and military commanders subordinate to the President, subject however to the provision of a "full and fair trial," with conviction and sentencing upon the concurrence of two-thirds of the tribunal or commission present. So while the rules and regulations are yet to come, we can get some inkling of their content by examining those promulgated by military commanders, such as Dwight Eisenhower in the European theater of WWII and Douglas MacArthur in the Pacific. While there are subtle differences, both commanders specified greater evidentiary latitude, including allowing secondary evidence where witnesses are unavailable and copies of documents and confessions to be admitted without undue delay or the kind of elaborate foundations required in cases before judges and juries, rather than military personnel.

Is all this just an elaborate denial of due process and sham proceeding? Hardly, the use of military tribunals was commonplace in World War II and those appearing before them were both exonerated and executed. The same is likely now. The "fair trial" mandated by the Bush order is also more likely to become reality simply because the discipline of legally-trained military personnel sitting in judgment has a better chance of being humanly evenhanded than finding somewhere in the universe a jury capable of being dispassionate about the use of human weapons of mass destruction against the Trade towers and Pentagon. Professor Tribe and I agree when he concedes that due process of law "both linguistically and historically permits trying unlawful combatants for violations of the laws of war, without a jury or many of the other safeguards of the Bill of Rights, provided each accused may hear the case against him and receives a fair opportunity to contest it through competent counsel."

Most importantly, military tribunals have the virtue of allowing evidence to be considered without necessitating the disclosure of classified information in open court or the identification of intelligence personnel and sources. And here the point of military tribunals, and their appropriateness, becomes plain. These bodies, unlike regular Article III criminal justice system,

are not primarily for purposes of punishment. They are extensions of the military campaign and the efforts of the President to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks."

Perhaps, that is why the creation of these tribunals in war time for the trial of war crimes is so well fixed and unassailable in constitutional precedent. The Supreme Court does not sit in ultimate review of the tribunal's work beyond assuring itself that the commission was properly empaneled. It is also why the jurisdiction of these bodies depends upon Congress' war power and the individual who, with how ever much reluctance he must surely have, acts as our Commander in chief.

Military tribunals are a necessary part of the war on terrorism, but they are not the only part. Attorney General Ashcroft has received from Congress enhanced law enforcement authority to combat terrorist organizations and those who harbor or finance them. Necessary questions were asked, and in my judgment, sufficiently answered as to whether these proposals curtail our civil liberties. They do not. Congress' prudent passage of the recent anti-terrorism legislation is well aimed at reconciling warrant and surveillance authority with global communications and detaining and removing those entering the United States for the purpose of causing civilian deaths through weapons of mass destruction. Unless construed well beyond their intended text and context, they should have no effect on the constitutionally protected speech and association of American citizens.

But it is surely now unfair and incredulous to harangue Attorney General Ashcroft for advising the President that should the new anti-terrorism legislation lead to the apprehension of bin Laden and his confederates that a civilian trial as if he were a common thief or murderer -- times, of course, several thousand -- would be appropriate.

As sensible as it may be to expand warrant authority in the context of terrorist emergency to include wireless and Internet communication and to raise the penalties for the knowing possession of biological toxins not reasonably necessary for peaceful purposes, to assume that the terrorist organizations responsible for September 11 should be tried in federal court is to confuse war and the crimes of war. Terrorists are neither soldiers nor garden variety criminals, meriting federal indictment, they are war criminals.

As the Afghan bombing has proceeded, the nature of the military operations needed to root out these architects of war crime is expensive and prolonged. Of course, it is also open to doubt whether any of the malefactors will be taken alive. But assuming some will, it is far healthier for the rule of law that the President has indicated their ultimate destination and method of punishment in advance. My former Justice Department colleague and U.S. Attorney General, William Barr, has been quoted as saying "[t]here's a basic tension as to whether to treat this as a law enforcement issue or a national security/military issue." He, of course, is right -- that is the heart of the issue.

Mr. Barr suggests that we "[f]ind these people and demolish them." That may happen on the field of battle, but if it does not and we apprehend them instead, their destination should be a military tribunal, not the U.S. District Court. By definition, terrorism is aimed at indiscriminately killing civilian innocents and destroying civilian property. Professor Tribe may think that definition imprecise, but I doubt that the citizens of New York who now live without mothers and fathers or sons and daughters share in his belief. Respectfully, whatever imprecision may exist under the order does not render it, to use Professor Tribe's words, "riddled with flaws," but merely subject to the reasonable construction historically accorded President's in the tactical decision making that accompanies a war effort.

Even Opponents Concede The Unsuitability of Regular Courts

Professor Tribe has sagaciously observed, however, that even if regular criminal proceedings might be stretched to accommodate the trial of unlawful belligerents, "it does not follow that they are best-suited for the task. . . . [S]uch nonmilitary trials grant an extended pulpit to an accused bent on claiming martyrdom and capable of stirring others to further acts of international terrorism." Professor Tribe's important observation reminds us, as President Bush's military order does, that the tribunals are only partially to punish, they are also to *prevent* "the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States." Yes, our objective is to punish those who took our brothers and sisters – or in my case a faculty colleague killed in the Pentagon plane – but it is also to root out and deter the instigators of further harm. In battle, this is best accomplished by a partial or targeted declaration of war, not against Afghanistan, itself, but the terrorists resident there, or anywhere. Tactically, in the present war, the battle necessarily extends to the disposition of those who are apprehended and suspected of war crime.

Are military tribunals then a violation of civil liberties? No, simply a recognition of well established precedent. Military belligerents violating the international laws of war are properly tried before a panel of military officers. Such military commissions received extensive use in the Civil War, and were affirmed by the Supreme Court in the famous World War II decision sentencing General Tomoyuki Yamashita to hang for the brutal atrocities he ordered against civilians in the Philippines. When Yamashita petitioned the Court for habeas corpus, the Court rebuffed him stating that the war power delegated by Congress includes administering a system of military justice for the trial and punishment of those combatants who have committed war crimes. No case contradicts this. The Civil War precedent, *Ex parte Milligan* that nominally questions the availability of military tribunals where civilian courts remain open, as Professor Tribe noted, was later confined to its unique domestic insurgency facts, and specifically the fact that Milligan was not – in international parlance – an "unlawful belligerent." Terrorists clearly are.

Farfetched Hypotheticals Should Not Distract Us From the Serious Tasks At Hand

Professor Tribe, and others, argue with various farfetched hypotheticals that the President's order might be misapplied. Aside from whether the President deserves in this time of emergency greater deference, it is simply not sound constitutional practice to invalidate executive action that has a completely constitutional range of application because it *might* be misapplied under a strained application of its text. Professor Tribe wants the Congress to step in, but it is not clear to what end. Indeed, given the text of the order and the President's full intention to apply it to the leadership of al Qaida or its terrorist equivalent, there is nothing to correct or rectify. Instead, opponents of the order proceed to mix issues by broadly complaining of Justice Department initiatives to interrogate those who have recently traveled to or from terrorist nations and fit other criteria or to monitor the conversations of those already convicted of terrorism and in jail or awaiting trial for espionage.

The Lawfulness of the Detention Policy

It is appropriate in concluding, therefore, to briefly examine the Attorney General's actions. First, as to detentions, it is very clear that the Attorney General is holding individuals who are either violating immigration law or needed as a material witness. In the former case, existing immigration procedures will be employed to dispose of the cases. In the second, Title 18 and Supreme Court precedent affirm the right to detain material witnesses who have knowledge of facts closely connected to a crime and whose testimony would likely be relevant and highly probative in a criminal proceeding. In this instance, the Attorney General is doing little more than applying well established statutory law that allows detention where a judicial officer determines that it may become impractical to secure the presence of the person by subpoena. 18 U.S. C. 1844. As Justice Jackson stated long ago for the Court, "the duty to disclose knowledge of crime. . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Stein v. New York*, 346 U.S. 156, 184 (1953).

The Lawfulness of the Request for Information

A fortiori if a citizen can be detained to disclose knowledge of a crime **as a duty of citizenship**, noncitizens here on immigration visas can certainly be asked to voluntarily answer questions that may lead to the apprehension of terrorists. As the Attorney General has repeatedly emphasized these individual have not been singled out for reasons of animus. They are being sought for reasons of common sense police work related to recent (with the last two years) connection with terrorist locations and their arrival on student, tourist and business visas similar to those employed by the terrorists of September 11.

As the FBI noted almost three years prior to September 11, "we have a problem with Islamic terrorism. . . . If we had a problem with Latvian terrorism, we'd focus on Latvians." John Mintz and Michael Grunwald, FBI Terror Probe Focuses on U.S. Muslims," *Wash. Post*, October 31, 1998 at A1. There is nothing unconstitutional about focusing police work on the likeliest suspects. Indeed, it is arguable that the factual profile being employed by the Attorney General – in any given case with a few additional facts – could support the reasonable suspicion standard

allowing not just voluntary, but involuntary, detention and questioning. The Attorney General with considerable restraint has not pressed this position. Rather, he has taken a narrow view of his authority that coincides fully with precedent, such as the Supreme Court's recent denial of review in *Brown v. Oneta* (2001). Police questioning based upon race is not unconstitutional so long as it is based on a race-neutral policy of obtaining a description of the assailant and seeking out persons who match it. Even putting aside the substantial questions of whether the Fourth Amendment applies to noncitizens in the same fashion as it does to citizens – a proposition that is highly doubtful in light of the Supreme Court's plurality decision in *United States v. Verdugo-Urquidez*. (1990) (indicating that aliens do not necessarily qualify as "the people" under the Fourth Amendment) – the Attorney General is well authorized to undertake the investigation that he has.

Prisoners Have No Privilege to Plot Future Terrorist Activity From Prison

Turning lastly to the monitoring of prisoner communications, the Attorney General has prudently limited this practice to 12 convicted terrorists and four people being held on espionage charges. It may come as a surprise to some, but a prisoner has no legal right to privacy. Prison officials regularly screen mail and monitor visits of those incarcerated. True, the law recognizes various privileges – such as attorney-client – but conversations are privileged only if they legitimately fall within the scope of the relationship. A conversation with one's attorney that facilitates new acts of terrorism is not privileged. The Justice Department policy is well-crafted to observe these constitutional strictures. First, the affected prisoners are notified in advance of the monitoring. Second, a "taint team" uninvolved in the prosecution of the affected prisoner will monitor and either discard privileged material related to trial preparation and the like or seek disclosure but only (barring emergency) with the approval of a federal judge. Again, even assuming that the Fifth and Sixth Amendments (privilege against self-incrimination and fair trial) apply to noncitizens in the same way as citizens, there is no constitutional violation unless the prosecution actually and intentionally obtains confidential information pertaining to trial preparation and defense strategy and that information is used to the defendant's substantial detriment. As the Supreme Court has long held intrusions into the attorney-client relationship are not per se unconstitutional. There must be a concrete showing of harm to the defendant and benefit to the State. *Weathersford v. Bursey* (1977). The Attorney General has established a procedure to monitor conversations not to harm criminal defendants, but to ensure the safety and security of innocent American citizens from future terrorist attack. That is not now, nor should it ever be, unconstitutional.

I hope this opinion is useful to the work of the committee, and I thank you for the opportunity to present it to you for your deliberations.

Respectfully,
/s/ Douglas W. Kmiec
Dean & St. Thomas More Professor
The Catholic University of America
School of Law

ITEM 4

BAXLEY, DILLARD, DAUPHIN & MCKNIGHT,
ATTORNEYS AT LAW,
Birmingham, AL, December 10, 2001.

VIA FAX, OVERNIGHT AND FIRST CLASS MAIL DELIVERY

Hon. JEFF SESSIONS,
*United States Senator,
493 Russell Building,
Washington, DC.*

DEAR SENATOR SESSIONS: I am, doubtlessly, one of your few constituents who has read the entire trial transcript of the Nuremberg Trials. In this vein, and as a result of my experience as both a prosecutor and as defense counsel, including appearing before military tribunals, I am writing now to address concerns expressed by some members of the press, and a few in Congress, relative to the utilization of military tribunals to determine the innocence, guilt, punishment or release of those who have been charged with crimes arising from the events of September 11, 2001, which are continuing today.

In my opinion, the security of this country can be best preserved by supporting and implementing the proposals of President Bush in this regard. I have faith that the men and women who would serve on these tribunals can afford any person accused complete justice, impartiality and fairness in the adjudication of guilt or innocence. Many Americans are unaware that at Nuremberg a number of those who were charged with war crimes were acquitted, and that some were convicted of some charges made against them, but acquitted of others. I recognize, of course, that the President's proposals differ from the procedures at Nuremberg. Nevertheless, I have endeavored to familiarize myself with the President's proposals and with objections to them which have appeared in the media. I consider myself sensitive to all legitimate arguments made in support of civil rights and liberties, but after considering all the arguments—pro and con—I continue to strongly support the President's proposals, and to endorse them during this crisis.

Please take these views into consideration as you consider the most appropriate action to take regarding prosecutions arising from the events of September 11, 2001, which are continuing events, and which threaten the security of our country. If I can be of any assistance to you in connection with decisions touching upon these issues in the United States Senate, or elsewhere, it will be an honor and a privilege for me to share my time and the benefit of my experience with you.

Respectfully yours,

BILL BAXLEY.

Senator SESSIONS. I would just like to run through a few of the questions that I think get down to the nitty-gritty. You may not be prepared to answer them, but maybe you can give us some of the difficulties and tensions in answering these questions.

We talked about habeas corpus. That's the right of a person to bring himself before a court to find out if they've been charged with a crime and what it is, fundamentally. That's the great writ. But the Quirin case, as I understood it, said fundamentally that there would be a right to bring them forward to make sure that the trial was appropriately tried in the military commission. Is that basically what the court decided in Quirin?

Mr. HAYNES. Yes, sir. That's why they heard it. They made the determination that it was appropriate.

Senator SESSIONS. So, otherwise, if it was properly tried in the military tribunal, a Supreme Court approved the complete handling of that case in the executive branch. Is that right?

Mr. HAYNES. Yes, sir. That's right.

Senator SESSIONS. I would just point out that Americans are so committed to civil liberties that we have some difficulties understanding there are other ways of doing justice. You do have an ap-

pellate process here. This order requires that a transcript of the case be made—the whole trial. Is that correct?

Mr. HAYNES. That's correct.

Senator SESSIONS. That an appeal be given to the President or, if he designates, the Secretary of Defense to review that record to make sure justice was done. Is that correct?

Mr. HAYNES. That is correct.

Senator SESSIONS. The Secretary of Defense could assign JAG officers and other officers, as he'd choose, to study and review every aspect of that, if he so chose.

Mr. HAYNES. Yes, sir. The form of that remains to be seen, but that's correct.

Senator SESSIONS. However he chose to do that. It would just strike me that we're operating under the war powers provision here, which is an executive-branch function, and I would suggest that history should be the guide. If it is the guide, Mr. Haynes, then any reviews and appeals will be within the executive branch. Is that correct?

Mr. HAYNES. That's correct. Although, as was said earlier, there's no intent to preclude an accused from seeking out habeas corpus writ.

Senator SESSIONS. Now, with regard to cross examining of witnesses, you were, rightly, not too quick to say, "Oh, of course, we're going to have full cross-examination of witnesses." I would just offer the point that the American justice system provides the greatest possible ability to cross-examine witnesses, far beyond that in most countries in the world.

But the point I would suggest to you is that if you have absolute right to do that, we'll have some serious problems, such as if the information that was critical to the conviction of a defendant came from a local citizen whose life might be at risk if it were known that he had provided information against the defendant. Or if the information came from an electronic intercept, the normal procedure in Federal courts is for the person who conducted the intercept to come into court, explain how he did it, how his equipment worked, and be subject to cross-examination. I don't think that's necessary. To that extent, you could have some limitation on the traditional civil right of cross-examination, and rightly so, would you not?

Mr. HAYNES. Yes, sir. The President's order says that the standard for admission of evidence is that it have probative value to a reasonable person. Now, the fact that some aspects may or may not be subject to cross-examination would go to the weight of the evidence. The triers of fact and the judges, if you will, would have to factor that in, and counsel would be able to comment on that.

Senator SESSIONS. Counsel would be able to comment on it and argue the point. I agree.

Military justice does provide our soldiers and sailors and airman and marines more protections than it does the terrorists or people who are committing war crimes against the United States. But isn't it true that history has proven and that the military is quite proud of its justice system and it does rely on all participants in it being part of the military chain of command?

Mr. HAYNES. Yes, sir.

Senator SESSIONS. So it strikes me that some believe juries can know nothing or have no connection whatsoever to a case. But in the military, every military man and woman is tried by fellow officers and enlisted people in general of a higher rank than they, isn't that correct?

Mr. HAYNES. That's correct.

Senator SESSIONS. I'm just real proud of the military justice system, Mr. Chairman. I, in the Army Reserves, served a few years as a JAG officer, although I never did attend the wonderful JAG school at the University of Virginia. It's one of the finest legal schools in the world, I think, and it turns out people who are committed to justice. Military men and women, officers particularly, are used to following orders and directives. If they're told to follow this evidence and exclude this evidence or admit this evidence, they will do so, and they will do so with integrity. It's done every day. People should not believe that just because this is a military matter that they have any desire whatsoever to convict an innocent person. Why would a military person want to do that? We have some on the extreme left and the extreme right that are so hostile to government that they are paranoid about any kind of final decision making process, and I think you have a good system here of allowing for appeals and creating a system that will be just. If not, Congress and the world will judge you for it. That's a high burden, I believe. Thank you.

Chairman LEVIN. Thank you.

Let me read the order now of recognition, assuming they're here. On the Democratic side, Senators Akaka, Ben Nelson, Bill Nelson, Dayton, Bingaman, Cleland, Lieberman, Landrieu. On the Republican side, Senators Collins, McCain, and Smith, in order of appearance. So the next who is here would be Senator Ben Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman. Thank you, Mr. Secretary, for coming back to appear before us. We're getting to know one another quite well from these exchanges. Mr. Secretary, I know I speak, as others have, for the American people in thanking you for what you and the men and women in the military are doing, demonstrating significant courage and commitment, and we wish you and all of them well in this endeavor, particularly in the days ahead.

I also realize that this is a question-and-answer period, but probably it's most enlightening for both of us just simply to express our concerns rather than try to get specific answers back from you on these issues. It's premature, but at least it will give you an idea of what concerns we have as you move through this process, both you and Mr. Haynes. I appreciate that opportunity, because you may be able to bundle together a process of appellate procedures, rules for proceeding, rules of evidence, certainly whether it's something that ought to be public or private, what kind of appeal might be taken, and all of those elements of the tribunal system will be important. I think you're hearing from each of us today our concerns about making sure that this system of justice isn't some weakened shadow of the justice of the American system that for over 200 years has continued to evolve in a rule of law rather than a rule of man. I believe that is very compelling, to be sure that what we do is appropriate under all the circumstances.

One of the most compelling arguments for the tribunal system, I think, in this particular case is the security issue of the individuals who are involved in the system, in the process, being able to provide that security against an invisible foe, one who has already demonstrated a willingness to disregard human and innocent life. I think that certainly is important.

The civilian process of working through that, I think, only raises more security issues. So I truly believe that is one of the most compelling reasons for doing it—not to weaken the justice system, not to get a diluted justice system for other individuals, but for security purposes.

I know that there will be another opportunity for you to come back and, at that point in time, probably questions will be more in order, rather than just simply giving you our thoughts, and so I will withhold any questions—specific questions, rather than to put you on the spot.

Secretary WOLFOWITZ. Well, that's very helpful. We have had some very useful exchanges this morning.

Senator BEN NELSON. Well, I think it isn't fair to keep asking you questions when you're saying, "Look, we haven't put this together." So what I would like to suggest is that as you think about whether the evidence is retained in private or whether it's public, that there may be instances, as with the bin Laden video, that it's less about a particular trial or a particular tribunal situation, and more about the public and the desire of the public to know, on the one hand, but really the importance of having the public more aware of what's going on with respect to somebody's guilt or innocence.

So I hope you will think about that, because once you start the process, unless you have fit in some sort of an exception—a waiver, exception, something like that—we may commit ourselves to a process that we could regret in the long-term or violate our own principles of justice, fairness, and due process that we are seeking to protect.

Thank you very much for being here. I look forward to another opportunity. Perhaps if I have some questions along the way, I might submit them to Mr. Haynes.

Secretary WOLFOWITZ. We appreciate that very much, Senator, and I appreciate your comments.

Senator BEN NELSON. Thank you. Thank you, Mr. Chairman.

Chairman LEVIN. Senator Smith.

Senator SMITH. Thank you very much, Mr. Chairman. Mr. Chairman, is it 8 minutes?

Chairman LEVIN. Yes.

Senator SMITH. Good morning, Mr. Secretary and Mr. Haynes. It's great to see you here. Let me join the chorus of those who have commended you for the outstanding job you're doing and will continue to do in this effort to fight against the terrorist networks around the world, and specifically Afghanistan. We appreciate your coming up. There has been a lot of controversy since the President announced the tribunal issue, and I think it is great that you came here and clarified a lot of the questions.

I might just say, Mr. Haynes, I'm sure you've had a lot of documents referenced to you, but I would refer one to you. In *The Fed-*

eral Lawyer, November–December, a senior judge of the Military Court of Appeals, the Honorable Robinson Everett, wrote a very interesting article entitled “The Law of War Military Tribunals and the War on Terrorism”. It’s a good overview, which you may find helpful. I would ask unanimous consent that it be put in the record.

Chairman LEVIN. That will be made a part of the record.
[The information referred to follows:]

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Federal Lawyer
November/December, 2001

Column
Focus on

*20 THE LAW OF WAR: MILITARY TRIBUNALS AND THE WAR ON TERRORISM

Hon. Robinson O. Everett [FNa1]

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THE EVENTS OF Sept. 11 generated grave concern regarding the possibility of future terrorist attacks on the United States and its citizens. Various measures have been proposed to help to prevent and to defend against such acts of violence. However, little attention has thus far been accorded the potential for use of military tribunals in connection with the war on terrorism.

Courts-Martial

Military tribunals may be of several types. The best known are courts-martial, which are authorized by the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946, and which come in three varieties. General courts-martial consist of a military judge and no fewer than five members, unless an accused requests a trial by a judge alone. Article 16, UCMJ, 10 U.S.C. § 816. Subject to limitations imposed by the President, general courts-martial may adjudge any punishment, including death, authorized by the Uniform Code and by the Manual for Courts-Martial.

Special courts-martial usually consist of a military judge and no fewer than three members, unless, again, an accused requests a trial by a judge alone. See Article 16, UCMJ, 10 U.S.C. § 816. Special courts-martial may adjudge confinement for not more than one year, partial forfeitures of pay, and bad conduct discharges for enlisted persons. Article 19, 10 U.S.C. § 819.

A summary court-martial consists of a single commissioned officer. He or she may try enlisted persons and may impose up to one month's confinement and partial forfeiture of one month's pay. 10 U.S.C. § 820.

Jurisdiction

Congress enacted the Uniform Code of Military Justice pursuant to its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces." Article I § 8, cl. 14. In light of this language, the Supreme Court held Article 2(11) of the code, which made subject to court-martial jurisdiction "persons serving with, employed by, or accompanying the armed forces outside the United States" unconstitutional. *Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependents); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (civilian dependent); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (civilian employee).

Until now, there has been no occasion for the Court to review the constitutionality of another of the code's jurisdictional provisions, that "in time of war, persons serving with or accompanying an armed force in the field" are subject to court-martial jurisdiction. See Article 2(10). However, in a case arising during the Vietnam War, the Court of Appeals for the District of Columbia Circuit held that a court-martial did not have jurisdiction under Article 2(10) to try for murder a seaman serving on an oil tanker under time charter to the Navy. *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969). Perhaps the power to declare war (Article I, § 8, cl. 11) would sustain the constitutionality of this provision.

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However, in that event, an actual declaration of war might be deemed necessary to invoke jurisdiction. *United States v. Averette*, 19 USCMA 363, 41 CMR 363 (1970).

Another provision of the Uniform Code concerning court-martial jurisdiction was held unconstitutional in *Toth v. Quarles*, 350 U.S. 11 (1955). Under Article 3 (a) of the code, court-martial jurisdiction is retained if a service member who has violated the code is separated from the armed services before court-martial proceedings commence. In the Supreme Court's view, however, a court-martial may not try one who was not in the armed forces both at the time of the crime and at the time of the trial.

The decisions in *Reid v. Covert* and *Toth v. Quarles* created a jurisdictional gap because -- aside from courts-martial -- no American court had been authorized by Congress to try either former service members or civilian dependents and employees overseas for violations of the Uniform Code. This gap was filled to a considerable extent by the recent enactment of the Military Extraterritorial Act of 2000, 1400 Stat. 2488 (Nov. 22, 2000). Under its provisions, a civilian employee of the Department of Defense, a defense contractor, or a civilian dependent of a service member or of a civilian employee may be tried by a federal district court for engaging in conduct outside the United States that would have been "punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territories jurisdiction of the United States." 18 U.S.C. § 3261. The act authorizes a federal magistrate judge to conduct some of the preliminary proceedings by telephone with the defendant, who is "21 represented by a qualified judge advocate. Furthermore, the act contains a saving clause that it shall not be "construed to deprive a court-martial military commissions, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. § 3261(c).

The Uniform Code contains numerous punitive articles -- Articles 77- 134, 10 U.S.C. §§ 877-934. Of these, two are especially broad in scope. Article 133, 10 U.S.C. § 933 prohibits conduct unbecoming an officer and gentleman and applies only to officers. Article 134, 10 U.S.C. § 934 proscribes conduct "to the prejudice of good order and discipline in the armed forces" and service-discrediting conduct. It also contains a provision that courts-martial may try "crimes and offenses not capital" -- which incorporates by reference noncapital crimes punishable under Title 18 of the U.S. Code or other federal penal statutes.

Congress has defined important new crimes and, in some instances, has authorized the death penalty for these crimes. One example is 18 U.S.C. § 2441, which punishes "war crimes" if the person committing the crime or the victim of the crime is either an American service member or an American national. The term "war crime" here means conduct that violates certain international conventions and protocols to which the United States is a party. The authorized punishments include imprisonment for life and death, if the victim dies.

Article 134's incorporation by reference only of crimes and offenses that are "not capital" presents an impediment to use of this statute as the basis for a prosecution in a court-martial under Article 134, because it authorizes a death penalty. In order to rectify this problem, Congress should reconsider the language of Article 134 that excludes "capital" offenses.

Military Commissions

A military commission is distinct from a court-martial. Perhaps the most famous case tried by a military commission is *Ex parte Quirin*, 317 U.S. 1 (1942). In that case, a military commission, which President Franklin Delano Roosevelt had established by executive order, tried several saboteurs who had disembarked from German submarines on a mission to disable American war plants. One of

these saboteurs claimed American citizenship, and all of them insisted, through counsel, that they were entitled to a trial in a civilian court. The military commission, which sat in Washington D.C., found the defendants guilty of violating the law of war and sentenced them to death for those violations.

The Supreme Court upheld the commission's jurisdiction, ruling that Congress had implicitly authorized the use of military commissions to punish violations of the law of war and that it was well-established that espionage and similar activities violated the law of war. Indeed, the trial of British Major Andre by a military tribunal during the American Revolution was cited as a precedent to this effect.

An American military tribunal, established pursuant to the law of war, tried Japanese General Yamashita in the fall of 1945 for his alleged war crimes in the Philippines. The crimes concerned Yamashita's failure to exercise command responsibility for the conduct of his troops. The Supreme Court again upheld the commission's jurisdiction. In *Re Yamashita*, 327 U.S. 1 (1946). Several years later, the Supreme Court held that a court established as part of American military government in the part of Germany then occupied by the United States had jurisdiction to try an American dependent for a crime she had committed. *Madsen v. Kinsella*, 343 U.S. 341 (1952).

Although these cases involved jurisdiction of military tribunals in connection with a declared war, the source of authority for these tribunals -- at least insofar as American constitutional law is concerned -- was the congressional power to "define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations." Article I § 8, cl. 10. Thus, if the acts of terrorists are considered to be offenses against the law of nations, Congress has broad authority to choose by what means to try and to punish such offenders.

In the exercise of its constitutional power to punish "offences against the Law of Nations," Congress has conferred the power to try law of war violations not only upon military commissions but also upon general courts-martial. Article 18 of the Uniform Code, 10 U.S.C. § 818, authorizes general courts-martial "to try any person who by the law of war is subject to trial by a military tribunal" and to "adjudge any punishment permitted by the law of war." In Article 21, 10 U.S.C. § 821, the Uniform Code elucidates that its provisions that confer jurisdiction upon courts-martial "do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

Furthermore, Article 36 authorizes the President to prescribe "pretrial, trial, and post-trial procedures, including modes of proof for cases triable ... in courts-martial, military commissions and other military tribunals." Article 104, which prohibits "aiding the enemy" and which applies to "any person," authorizes "death or such other punishment as a court-martial or military commission may direct"; and Article 106, headed "spies," directs that "any person who in time of war" acts as a spy "shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."

The language of the code that authorizes both general courts-martial and military commissions to punish certain violations of the law of war poses some interesting issues. Does "war" in this context require a declared war? If so, these statutory provisions have little effect, because declared wars have gone out of style and, since World War II, wars have been, for the most part, undeclared. If, however, an undeclared war is also included within the references in the code to "law of war" and "time of war," at what point do combat operations reach a level that warrants their being referred to in this context as "war"? When is there an "enemy" for purposes of the law of war? Cf. Article 99 (misbehavior before the enemy); Article 104 (aiding the enemy). And does presidential use of the

phrase "war on terrorism" have any legal significance in determining the jurisdiction of military tribunals to enforce the law of war?

Terrorism on Trial

Military tribunals -- such as courts-martial and military commissions -- may, in the future, prove more useful than civilian courts in punishing conduct, which, like piracy, is universally condemned and therefore may be considered a violation of the law of nations. Unlike a federal district court, for example, a military tribunal can be convened overseas, if desirable to facilitate access to witnesses or because of reluctance of a foreign government to surrender its nationals for trial in the United States. If military tribunals are the forums of choice for trials of terrorists, then they should be general courts-martial, which will use familiar procedures established by the Uniform Code and the Manual for Courts-Martial, rather than military commissions, with their ad hoc procedures prescribed by executive order.

And what appellate review should be provided in such cases?

To facilitate the use of courts-martial, the Uniform Code should be revised so that references in Article 18 to the law of war include references to the law of nations. In light of the almost universal international support the United States has received in its effort to punish the terrorists who conceived the attack on America, one may argue that these terrorists violated universal norms prescribed by the law of nations and that they may therefore be tried by national or international courts without direct reliance on the law of war.

Despite rhetoric about the war on terrorism, and even though the concept of "war" has been extended to include undeclared wars, terrorist violence cannot be viewed as an act of war in any traditional sense. However, treating these acts as offenses against the law of nations is far easier to justify. Simply analogize these acts to acts of piracy, which have for many centuries been viewed as violations of the law of nations and subject to trial and punishment by any nation able to apprehend the pirates.

In emergency situations, as well, military tribunals may be important. Although the Constitution contains no specific provision authorizing martial law, periods of emergency may occur when ordinary civilian courts cannot function and military tribunals must be utilized. In that event, the authority of such courts continues only as long as emergency conditions preclude the ordinary operation of the civil courts. Cf. *Ex parte Milligan*, 71 U.S. 1 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Conceivably, terrorist attacks may create an occasional need to declare martial law -- and to use military tribunals to enforce this law during emergency periods. Congress should provide that these tribunals will follow the procedure provided by the Manual for Courts-Martial.

The armed services and Congress should seek to anticipate possible situations when military tribunals should be used to try terrorists for their acts of violence and espionage. The most likely situations would be those in which it seems necessary or desirable to conduct trials outside the United States. Under those circumstances, the Supreme Court might conclude that the cases fall outside its jurisdiction. Cf. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Nevertheless, because such trials would involve many other nations, they should be conducted in a manner that would brook no dispute with the fairness of the results. To this end, courts-martial -- which have well-defined rules of procedure and rules of evidence -- are preferable to the use of ad hoc military commissions.

Conclusion

At present, the future is unpredictable. However, it is foreseeable that, as in the past, military tribunals will play a role in dealing with terrorists and with emergencies resulting from terrorist acts. Therefore, our leaders must consider what legislative and executive measures will best enable such a tribunal to perform this role fairly and effectively, and they must take such actions that will ensure the ability to do so.

[FN11] Hon. Robinson O. Everett is a professor of law at Duke University School of Law. On April 16, 1980, he became the fifth chief judge of the U.S. Court of Military Appeals. He served as chief judge until his retirement on Sept. 30, 1990, and is now a senior judge. In 1987, Chief Judge Everett received the Earl W. Kintner Award for distinguished service to the Federal Bar Association.

Senator SMITH. I wasn't here during your earlier testimony, but I was watching it on television, and you did reference a number of

tribunal precedents, Mr. Secretary. President Truman used one, as well, on the Bataan Death March—I don't believe that one was mentioned—in the Yamashita case. They used it again trying German soldiers spying in China against America after the surrender of Germany. His decision was upheld by the Supreme Court in *Johnson versus Eisentrager*.

It's interesting. Every time it's been used, it's been upheld by the courts. So those who join this chorus of unconstitutionality have very little, if any, evidence to support that charge at all. Interestingly, one decision was written by Justice Jackson, who was the lead prosecutor in the war crimes trials in Nuremberg. So I think many have suggested the constitutional issue.

Although it sounds good about whether or not an alien terrorist will have constitutional rights, the truth is that's not what the Supreme Court had in mind. On the contrary, in the *Eisentrager* case, the most recent opinion regarding military tribunals, the court held that there were no incidents, "where a court, in this or any other country where a writ of habeas corpus is known, has issued it on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction." Nothing in the text of the Constitution extends such a right, period.

Every time, that I can find, the Supreme Court has upheld these tribunals. I would not want to be in a position where bin Laden were to be let go because somebody didn't read him his Miranda rights. I don't think that would go over very well. I certainly do not believe that his kind should be entitled to the benefit of civilian Federal criminal procedure where good lawyers would have a lot of fun with that. I don't think we need that in America.

I would make one other point, then, and ask a couple of very specific questions. In the chorus of critics, I remember when President Clinton signed a treaty to create the International Criminal Court, which, if Americans were hauled before it, would deny them basic rights, including trial by jury, number one, of their peers, protection from double jeopardy, and the chance to confront one's accusers. As a matter of fact, Secretary Rumsfeld, I think, warned that "the American leadership could be the first casualty of the ICC".

Did you have any input into that comment, Mr. Secretary? Or could you clarify what you might have meant by that?

Secretary WOLFOWITZ. I don't. I mean, I think it speaks for itself. It's pretty clear.

Senator SMITH. It does speak for itself. Let me ask Mr. Haynes just a few questions. If you can answer, fine. If you can't, when you know, we will hear it or you could provide it for the record.

Do you intend to hold all trials of alien terrorists who are not here in the United States exclusively outside the U.S. borders?

Mr. HAYNES. Senator, there have been no decisions about that, either in the regulations and indeed—

Senator SMITH. No decision?

Mr. HAYNES. That's correct.

Senator SMITH. Okay. In 1995, I had language added to a piece of legislation that provided for a judge to be set up to hear evidence on the deportation of those who may be involved in terrorist activities. The problem is, of course, it's never been used, because the intelligence community doesn't want to compromise sources and

methods by providing the information to the terrorist or his attorney.

Why can't we come back, in the case of those where we might have good information that they may be involved in a network but haven't committed a crime yet—is there any feeling in the administration that we could re-institute those courts and provide deportation to some of these people?

Mr. HAYNES. I'm not familiar with that option, Senator. I will look into it and get back to you.

[The information referred to follows:]

The Alien Terrorist Removal Court of the United States, established pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, remains the law of the land. We are in the process of coordinating with the Department of Justice about this option.

Senator SMITH. Alright. Back onto the promulgation of the rules. Have you given any thought to only using uniformed military officers to practice before the tribunal?

Mr. HAYNES. That's certainly one of the options. Yes, sir.

Senator SMITH. Clarifying in advance the rules of procedure by making applicable the Manual for Courts-Martial?

Mr. HAYNES. The President has made a finding in the order that it is not practicable to use the normal rules. Now whether and to what extent the Secretary of Defense may choose among those or create totally different ones, we haven't decided.

Senator SMITH. What about using judges from the Military Court of Appeals, active or retired?

Mr. HAYNES. That is an option.

Senator SMITH. Can their privacy be protected in these trials in a way that they would avoid some of the problems that have already happened in the case of the judge who heard the one terrorist case earlier in the New York?

Mr. HAYNES. I believe you're referring to the 1993 conviction.

Senator SMITH. Yes.

Mr. HAYNES. In that, the security of the people who administer the process is certainly a concern and conceivably, along with other factors, might be a factor in deciding whether and to what extent proceedings might be held outside of the press.

Senator SMITH. Last question. I'm assuming you're going to draw pretty heavily on the Nuremberg trials, and that's probably the best historical example we have. Is that correct?

Mr. HAYNES. The Nuremberg trials were international trials, as opposed to United States tribunals, but the procedures there are certainly very helpful to—

Senator SMITH. That's what I'm talking about, the procedures.

Thank you very much, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Smith. Senator Bingaman.

Senator BINGAMAN. Thank you very much, Mr. Chairman. Thank you, Secretary Wolfowitz. I appreciate both of you being here. Let me put this in a very broad context. As I see it, what we are talking about here are really three stages. There is the stage at which the President makes his determination that someone is a foreign terrorist or a war criminal. I think under the order here, he makes the determination that someone is engaged in acts of international terrorism. So that's the first stage.

The second stage is what you would be responsible for. That would be conducting the full and fair trial of any such person who was previously determined by the President to have been engaged in acts of international terrorism. Then the third stage would be any appeal or any judicial review or any review by anybody of what occurred at the trial. So that's a very general way to think about it.

I'm concerned about the first stage, where the President—in this order, it says—this term, “individuals subject to the order shall mean any individual who I determine from time to time in writing as engaged in acts of international acts of terrorism or abetted or aided in that.” Do we have a definition of “international terrorism”? Is there any limit on the President's ability to make a determination in that regard?

Mr. HAYNES. If I may, let me qualify a little bit about what you've said at the outset. The President's order says that he doesn't necessarily make a determination at the outset that they are a terrorist.

Senator BINGAMAN. It does. It says, “Whom I determine from time to time in writing that, first, there's a reason to believe the individual at the relevant times is not a citizen and, second, that they have committed an act of international terrorism.”

Mr. HAYNES. That is correct. The words that I was beginning to focus on are “that there is reason to believe.” So, in other words, he is not making a determination at that point.

Senator BINGAMAN. So he just has to make a determination that there's reason to believe that.

Mr. HAYNES. That's correct. He also has to factor in, not just the language that you quoted, but he also makes a separate determination that it is in the interest of the United States that such individual be subject to the order. So there are a couple of self-imposed standards that he—

Senator BINGAMAN. But is there any definition of what we're looking at when we talk about an act of international terrorism?

For example, when Timothy McVeigh blew up the Federal building there in Oklahoma, if he had been a foreign national legally resident in this country, would he be someone who had engaged in an act of international terrorism, in your opinion?

Mr. HAYNES. Well, you make an important qualification. The President's order does not include U.S. citizens. So when you—

Senator BINGAMAN. I'm saying if he had been a foreign national, would that be a case that would be appropriate for a military tribunal?

Mr. HAYNES. It might be, depending on all of the facts present at the time. If the President made the determination that there was reason to believe that—again, in looking at the order, it is not just international terrorism, it's also “is or was a member of the organization known as al Qaeda, has engaged in, aided and abetted,” and so forth, or has knowingly harbored. Now, those are in the alternative.

Senator BINGAMAN. The question is, is blowing up the Federal building in Oklahoma an act of international terrorism? You're saying it may well be.

Mr. HAYNES. You have changed the facts so significantly already. Let me play that out. One would think that the President would consider whether that had some link outside the country to make it international.

Senator BINGAMAN. So the fact that the person was foreign would not necessarily make it international.

Mr. HAYNES. That is the President's determination to make.

Senator BINGAMAN. But there's no limit on the ability of the President to make that. He is well within his rights, as you see it, to make that determination that McVeigh should be tried in a criminal tribunal—in a military tribunal.

Mr. HAYNES. I'm very uncomfortable talking about an individual who is a U.S. citizen, who is specifically not subject to the order. So using the——

Senator BINGAMAN. Well, let me ask about another one. What about Ted Kaczynski? If he were foreign—if he had been a foreign national, do you see any problem with the President making a determination that his activities in mailing these explosive devices to people was an act of international terrorism?

Mr. HAYNES. If you're positing a non-U.S. citizen engaged in international terrorism and whether those acts had some nexus to something outside the country—I think that would be an important factor for the President to consider. You haven't put that in your hypothetical. So if the acts were purely within the United States——

Senator BINGAMAN. You're saying there has to be some nexus to something outside the country in order for this to apply.

Mr. HAYNES. Well, in order for it to be international terrorism, one would think that there would have to be something outside the United States, some means to make the determination that this is international in character.

Senator BINGAMAN. Usually, military tribunals, as I understand it, have been invoked and used when you are, in fact, trying people who are engaged in some kind of military action against our country. Is that a fair statement? One of your statements here, Secretary Wolfowitz, is that it is well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to rights and procedures that would apply. I guess the question is, is that what we're talking about here? People who are engaged in armed conflict with the United States?

Mr. HAYNES. It is the purpose of this order to try war crimes.

Senator BINGAMAN. War crimes, meaning the person who is going to be subject to this needs to be engaged in some kind of a war effort against our country, not just a freelance terrorist who has a point of view that is inimical to our general point of view or our policies or our way of government or whatever.

Mr. HAYNES. I think that is a fair way to look at it, but I also want to reiterate that, as written, the President's order requires a specific written individual determination by him which recognizes the fact that these cases will depend on all the facts and circumstances. So I don't want to generalize too much beyond what's in the order.

Senator BINGAMAN. Is there going to be any kind of a threshold or a set of procedures that the President would adhere to in making his determination? To what extent is his determination in any way reviewable? I guess there's no review of it under the order that has been issued.

If, for example, someone were to be turned over or determined by the President to be subject to this order, and he determines that there is evidence to indicate that you're involved in international terrorism, there is no way to dispute that. I mean, there's no way to say, "I deserve to be tried in a Federal court."

Mr. HAYNES. Well, there will be a trial.

Senator BINGAMAN. But prior to actually having the trial in the criminal court or in the military court, there is no way to say, "I deserve to be tried in a regular Article III Court under the Constitution because I do not meet the criteria that would justify the President putting me in a whole different system."

Mr. HAYNES. That's correct.

Senator BINGAMAN. So there's no review.

Secretary WOLFOWITZ. The order makes clear that the first criteria is if the President has reason to believe that the individual is or was a member of the organization known as al Qaeda. That is, I think, clearly where the focus is. If one takes one of your purely hypothetical cases of somebody who simply is a foreign national, if there's none of the reasons that would apply to preserving the security of the trial, no connections to foreign terrorist groups that would threaten the safety of judges and jurors, no reason to have classified evidence collected abroad by intelligence agencies, none of the reasons we've explained for the reason of the order—we're not here to prejudge or take away the President's discretion, but that kind of case, it seems to me, starts to define itself into the regular civilian court system, and we have a perfectly effective civilian court system for trying people guilty of acts of terrorism, including Mr. Moussaoui, who has clear links to al Qaeda.

So, maybe I'm making a mistake in getting into the legal issues. There are a lot of hypotheticals, and we have to be very careful. The President does have a lot of authority, but it seems to me the Quirin case was precisely a case of where the courts reviewed whether that authority was properly exercised, and it was judged that it was.

I think someone who was your—I've forgotten the name of the Unabomber—the Unabomber, but with foreign nationality, would have, I think, lots of ways to make sure that they were properly put into the military tribunal system, if they were.

Senator BINGAMAN. Well, properly put in the military tribunal system or properly put into the Federal court system?

Secretary WOLFOWITZ. Either one.

Senator BINGAMAN. So you think they would have a right to be tried in the Federal court system?

Secretary WOLFOWITZ. No, I didn't say that. I think they would have an opportunity, because they're here in the United States, to appeal for habeas corpus.

Senator BINGAMAN. My time is up. Mr. Chairman, thank you.

Chairman LEVIN. Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman. Thank you, Secretary Wolfowitz and Mr. Haynes. I appreciate the discussion. It's been very helpful.

It strikes me that part of what we're all wrestling with here is that we're dealing with a matter of first impression for most of us. We have not been involved in the United States constituting military tribunals for war crimes, at least not in my direct involvement, for some period of time. We have witnessed, in recent times, international war crimes tribunals which have tried people involved in the Rwanda genocide and the Balkans, as well. So we are working our way through this. I'm doing the same myself.

The other problem here is that we are a country that prides itself on adhering to the rule of law, and yet we are, for all intents and purposes, at war. One of the distinctions I think that we are trying to make is how appropriately, as a country where we value the rule of law, do we handle those who we capture as part of this war. In other words, for some time there's been criticism that we've been treating terrorism too much as a legal violation instead of what it was—and it became clear on September 11 that it was an act of war.

In the reading and thinking that I've done about this, it certainly does seem clear to me that the President has the right to constitute military tribunals for violations of the laws of war. Perhaps because this is a matter of first impression, I think a lot of people have been imagining the worst as they consider how these military tribunals might be used. It is also true, probably, that they've been imagining the worst because the specific wording of the military order is, in some senses, vague and requires the kind of guidelines that you're now working on and the reassurances people are looking for.

The order was also issued in the context of other actions that have alarmed people, the several hundred people detained, the broad and mass questioning of Arab Americans or Muslim Americans.

But it does seem to me that today you have offered what I was hoping for, and I hope the guidelines provide also, which is reassurance as to the way this administration is going to employ military tribunals as part of our war against terrorism—rights of appeal, rights of habeas corpus, full and fair trial, and what that means. So I appreciate that.

I want to talk to you about the indictment yesterday of Zacarias Moussaoui. This is the first criminal charge filed by the United States Government directly related to the attacks against us on September 11. I'm going to share with you my first impression, because I've just begun to think about it this morning, and maybe you or others will alter my impression. But my first impression is that the actions taken against Mr. Moussaoui go beyond reassurance and they are actually quite troubling and, to me, surprising, because we have taken here a non-citizen of the United States, not even a lawful permanent resident of the United States, a French citizen of Moroccan descent, who, according to the charges filed against him, "Is accused of conspiring with Osama bin Laden and al Qaeda to murder thousands of innocent people in New York, Virginia, and Pennsylvania on September 11".

This is not some foot soldier in al Qaeda hiding in a cave over in Afghanistan. This is a guy who came to the United States—according to the indictment that I read in the papers this morning—who conspired with the other 19 and, allegedly, directly with bin Laden at some point, to carry out these acts that killed thousands of our fellow Americans. He is a non-citizen, not entitled to the protections of the Federal district courts of the United States of America.

So I'm troubled by the precedent that this sets as to what the administration will do regarding those who have violated the laws of war. I mean, what greater violation of the laws of war could there be than to have been a coconspirator in the attacks that resulted in the death of 4,000 Americans here on our soil? His direct involvement in that being constrained only by the fact that he was apprehended because people at the flight simulation he was training at, presumably to carry out one of the attacks, reported him?

I mean, if we will not try Zacarias Moussaoui before a military tribunal, a non-citizen accused of being a coconspirator in the attacks that killed 4,000 Americans, who will we try in a military tribunal? What standard does this set for what will be done? I mean, surely it can't be just the happenstance that he was apprehended in the United States of America as opposed to Afghanistan or somewhere else in the world.

I must say, Secretary Wolfowitz, in the three points—or is it four—that you mentioned in your opening statement, as to why military commissions should be used—we can better protect civilian judges, jurors, and courts from terrorist threats and assure the security of the trial itself, Federal rules of evidence often prevent the introduction of valid factual evidence for public-policy reasons that have no application in a trial of a foreign terrorist, third, military commissions can allow the use of classified information without endangering sources and methods—every one of those, I would argue, on first impression this morning, argues for Mr. Moussaoui to be brought before a military tribunal. So I find this a troubling decision, and I wonder if you could reassure me.

I mean, this guy, to use the parlance of the regular criminal courts of the United States, is a “big fish,” and I fear that the decision to try him in the Federal district courts of the United States, with all the rights of evidence and rules of evidence and rights of due process, may let this big fish get away. The other 19 criminals who carried out these acts are dead. We happen to have grabbed this guy, and, I don't want the rules of hearsay to be applied to this case. He doesn't deserve the rules of hearsay to be applied to him or any of the other rights that citizens of the United States have when accused of a crime.

So I am troubled, and I wonder—I suppose I ought to ask the direct question, whether the Department of Defense was consulted before the decision was made by the Justice Department to try Zacarias Moussaoui in the Federal district courts?

Secretary WOLFOWITZ. We were not, Senator, and so I probably should be careful not to speculate about the considerations. But it does seem to me that presumably the decision by the Justice Department to indict Mr. Moussaoui in a civil court is an indication that they believe they did not have, for example, the problem that

I mentioned of evidence, important evidence that might not be admitted under normal rules of procedure or the problem of relying on classified evidence, and that they could probably convict this man in the civil court.

Remember, the goal of these military tribunals is to be able to have full and fair trials and defend the United States. I think there's more than one instrument for achieving that. The President has made it clear there may be circumstances in which this one is necessary. I wouldn't want to go further.

Senator LIEBERMAN. I suppose I'm relieved to hear that the Department of Defense wasn't involved in this decision. As I said, I think it goes beyond reassuring us and takes an enormous risk with the only person we have in our hands right now who, in my opinion, based on the evidence I've read, was directly involved in preparing to carry out the attacks of September 11. I think it takes a large risk to bring him before the district court, with all the rights that he would have there, that he doesn't deserve, frankly.

Mr. Haynes, I'm sorry, did you have a comment?

Mr. HAYNES. Well, Senator, we don't know everything the Department of Justice knows. I actually think that you might draw some comfort from the fact that this may be an illustration of how carefully the President intends to employ this tool that he has created in this military order.

The man that you're describing was apprehended before September 11. He is in the criminal justice system in the Article III Criminal Justice System. Unless the President makes a specific written determination that he should be subject to the order under those terms and that it is in the National interest or the interest of the United States to provide him to the Secretary of Defense, then he should stay there. But we are unable to comment on what evidence they may have.

Senator LIEBERMAN. My time is up. I thank you both.

Chairman LEVIN. We have to conclude now, under the Senate rules. There has been an objection filed, and we have no alternative but to adjourn this hearing.

I want to just conclude, though, with a follow-up to Senator Lieberman's question. Was the Secretary of Defense, or the Defense Department, consulted on the drafting of the Presidential order prior to its being issued?

Secretary WOLFOWITZ. Yes, we were.

Chairman LEVIN. You were involved in the drafting?

Secretary WOLFOWITZ. We were consulted on it.

Mr. HAYNES. We were consulted, but I don't think we can comment on what advice we gave.

Chairman LEVIN. I'm not asking for that. Did you give advice on the order? I'm not asking what it was. I'm just asking whether you gave advice?

Mr. HAYNES. Our views were consulted.

Chairman LEVIN. Senator Lieberman has raised an important point on Mr. Moussaoui. I must say, I am not reassured that you weren't consulted. It is hard to imagine that in a matter that fits the military tribunal order the way the Moussaoui case appears to fit it, you weren't consulted because then you'll be applying these

criteria in other cases which are very similar or maybe the same as Moussaoui's case. So I'm kind of amazed you weren't consulted.

Senator LIEBERMAN. Senator Levin, if I may, I would accept your amendment. I guess I was speaking more directly to Secretary Wolfowitz, who I have such a high regard for, and I didn't want to believe that he was consulted before this decision was made. But you are absolutely right. It is wrong not to have consulted the Department of Defense because we are at war and Moussaoui is a war criminal. He was a soldier who attacked American civilians, and therefore, I hope the Department of Defense will be consulted in each and every future decision of this kind that is made.

Chairman LEVIN. Secretary Wolfowitz, when I left here to go to vote, I was asked by many members of the press whether the decision has been made to withdraw from the ABM Treaty. That was the question I was asked most often by members of the press. Has the decision been made to withdraw from the ABM Treaty?

Secretary WOLFOWITZ. Senator, I think the President and the Secretary of State and Secretary of Defense have made it clear—

Chairman LEVIN. I understand. Has the decision been made to withdraw?

Secretary WOLFOWITZ. As far as I know, Senator, no final decision has been made yet.

Chairman LEVIN. Has not been?

Secretary WOLFOWITZ. As far as I know, no final decision has been made yet.

Chairman LEVIN. Under the rules of the Senate, we are required to adjourn. We will come back again, because the hearing is not completed, but we have no alternative, under Senate rules now, but to stop exactly where we are. So the hearing will stand in recess.

[The prepared statements of Senators Akaka and Thurmond follow:]

PREPARED STATEMENT BY SENATOR DANIEL K. AKAKA

Thank you, Mr. Chairman. I thank you for holding this hearing and I appreciate Deputy Secretary Wolfowitz and Mr. Haynes for taking the time to join us this morning. It is well within the President's authority to convene military commissions. The terrorist attacks on September 11, 2001, were acts of war. Military tribunals have been utilized many times during our country's history. I am interested, however, in how the Department plans to implement the military order on November 13, 2001, to ensure fairness and justice.

PREPARED STATEMENT BY SENATOR STROM THURMOND

I welcome the opportunity to hear from our distinguished panel on how the Department of Defense plans to implement the President's order on the detention, treatment, and trial by military commissions of certain non-citizens in the war on terrorism. Hopefully, today's hearing will clear up the misconceptions held by individuals in this country and the rest of the world on the role of the Military Commission.

Mr. Chairman, I support President Bush's military order. Not only is the President's order historically based, but it was issued pursuant to current law. Military commissions are rooted in American history, from the trial of deserters in the Mexican-American War to the trial of President Lincoln's assassins, to the trials of Nazi saboteurs during World War II. Congress has recognized the role of the military commissions by codifying their use in Title 10 of the United States Code.

Military commissions to try non-citizens are also good ideas as a matter of policy. These commissions would allow for the use of classified information, while protecting it from inadvertent release. They would protect the identity of witnesses and other trial participants. They allow for more flexible rules of evidence to take into

consideration the fog of war. What they do not allow is the miscarriage of justice and that should be the focus of today's hearing.

Mr. Chairman, those responsible for the deaths of the thousands of innocent victims at the World Trade Center and the Pentagon acted outside the norms of the civilized world. Their deeds were an act of war! The President's executive order, providing for the detention and possible trial of terrorists in military courts, recognizes this and is an appropriate response to the events of September 11, 2001.

Thank you, Mr. Chairman.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR CARL LEVIN

CHAIN OF COMMAND

1. Senator LEVIN. Secretary Wolfowitz, both the Department of Defense and the Department of Justice have acknowledged the authority of the Secretary of Defense to prescribe appellate procedures for the military commissions. Both Departments have also acknowledged that habeas corpus is available only to an individual tried by a military commission in the United States. That leaves individuals tried by a commission outside the United States without a right to appeal to an independent entity unless it's specifically provided for in the regulations. The right to such appeal becomes more important if the military commissions are comprised only of persons in the military chain of command, because in that case the accuser and the trier are blended into one. If the death penalty is an option, the situation becomes of greater import. Courts-martial, which are heard by uniformed personnel within the chain of command, provide for appeal to the U.S. Court of Appeals for the Armed Services, an independent entity outside the chain of command. It also allows for final appeal by certiorari to the U.S. Supreme Court. The issue of the independence of the tribunal and an outside appeal are related. What are your thoughts on the need for the inclusion of individuals outside of the chain of command in the composition of the military commission?

Secretary WOLFOWITZ. DOD continues to consider a full range of options regarding who will be eligible to participate on military commissions. Although Secretary Rumsfeld has not yet made a determination regarding the final implementation procedures, his goal is to ensure that every military commission will comply with the President's directive to provide a "full and fair trial," and will reflect our Nation's commitment and dedication to uphold the highest traditions of the law.

2. Senator LEVIN. Secretary Wolfowitz, what are your thoughts on the need for appeal to an independent entity, particularly if the military commissions are comprised only of persons in the chain of command?

Secretary WOLFOWITZ. DOD is committed to providing appropriate review of military commission decisions. To achieve this end, DOD is reviewing past and present domestic and international tribunals for appropriate models.

CONSULTATION

3. Senator LEVIN. Secretary Wolfowitz, in your testimony before the committee, you said the Department is consulting a wide array of individuals and experts, in and out of government, to discuss how military commissions should operate. Please identify all persons and entities the Department has consulted and explain how you selected such persons and entities.

Secretary WOLFOWITZ. A number of Members of Congress have contacted DOD to express their views regarding how military commissions should operate. Additionally, DOD has received candid and confidential suggestions from a considerable number of individuals and organizations, inside and outside government, to ensure the final implementation procedures meet our present needs in the ongoing war against terrorism and uphold our values and commitment to the rule of law. Among the individuals outside government who have been consulted are: Judge Griffin B. Bell; Hon. William T. Coleman; Lloyd N. Cutler; Hon. Martin R. Hoffman, Professor Bernard D. Meltzer; Hon. Newton N. Minow; Hon. Terrence O'Donnell; Judge William H. Webster; and Professor Ruth Wedgwood. These individuals were selected for their experience and their range of views. Additionally, a large number of organizations outside government have forwarded unsolicited recommendations, including: the American Bar Association; the American Civil Liberties Union; the American Jewish Committee; Amnesty International; the Association of the Bar of the City of New York, Standing Committee on Military Affairs and Justice; the Bar Associa-

tion of the District of Columbia; the Center for National Security Studies; the Committee to Protect Journalists; Defender Legal Services; Human Rights Watch; the Lawyers Committee for Human Rights; the National Association of Criminal Defense Lawyers; the National Institute of Military Justice; the Nuremberg Legacy Project; and the Robert F. Kennedy Memorial Center for Human Rights.

DEATH PENALTY

4. Senator LEVIN. Secretary Wolfowitz, in your testimony before the Committee, you stated that you are confident that the Department will develop a process that Americans will have confidence in and which is fully consistent with the principles of justice and fairness our country is known for throughout the world. However, the President's Order treats death and imprisonment in the same way. Both can be imposed with a two-third's majority of a quorum of the members of the commission. In the case of a five member commission—it's conceivable, albeit highly unlikely, that the death sentence could be invoked with only two members of the commission voting for it. We are already hearing from some of our allies that they may not extradite suspects to the United States if they face the death penalty under any circumstances. Doesn't the absence of a requirement for a unanimous verdict for a death penalty in the order make that more likely?

Secretary WOLFOWITZ. Secretary Rumsfeld is still deliberating regarding the final implementation procedures, including issues related to capital punishment. While the United States and some allied governments have differing perspectives on this sensitive issue, DOD is working closely with the Departments of State, Justice, and others to build upon our very successful effort to achieve a broad coalition of nations committed to defeating terrorism.

5. Senator LEVIN. Secretary Wolfowitz, shouldn't the imposition of the death penalty require a unanimous verdict?

Secretary WOLFOWITZ. Secretary Rumsfeld is still deliberating regarding that decision.

6. Senator LEVIN. Secretary Wolfowitz, the order leaves open the possibility that a death penalty could be imposed based on only a preponderance of the evidence. That could mean a sentence to death based on only 51 percent of the evidence. Do you think it meets our standards of justice and fairness to have a death sentence imposed on a preponderance of the evidence?

Secretary WOLFOWITZ. Every military commission will comply with the President's directive to provide a "full and fair trial." Secretary Rumsfeld is still deliberating regarding procedures relating to imposition of the death penalty.

EXECUTIVE REVIEW

7. Senator LEVIN. Secretary Wolfowitz, the President's Military Order provides that the Secretary shall issue such orders and regulations as may be necessary to carry out any of the provisions of the order. Will there be any review within the executive branch of such orders and regulations prior to their issuance?

Secretary WOLFOWITZ. Yes. DOD is coordinating closely with a number of other agencies involved in protecting our national security.

TRIAL RULES

8. Senator LEVIN. Secretary Wolfowitz, will the same rules and procedures apply to all individuals who are designated for trial by military commissions or will there be different rules and procedures for different individuals?

Secretary WOLFOWITZ. DOD is considering a uniform set of procedures at this time.

9. Senator LEVIN. Secretary Wolfowitz, will the orders and regulations be proposed for comment before promulgation?

Secretary WOLFOWITZ. Secretary Rumsfeld is still deliberating regarding that decision.

10. Senator LEVIN. Secretary Wolfowitz, the suggestion has been made that once the Department has drafted the orders and regulations implementing the President's Military Order that they be made available to Congress for a limited period of time—say 10 to 15 working days—before they are formally promulgated, to give

Congress the opportunity to comment. What is your position with respect to that suggestion?

Secretary WOLFOWITZ. DOD is committed to working closely with Congress to ensure every military commission convened pursuant to the President's Military Order reflects our Nation's values.

MILITARY JUSTICE

11. Senator LEVIN. Mr. Haynes, the President's Counsel has likened the military commissions to the military justice system. During the Committee's hearing, one member said that if the Uniform Code of Military Justice is good enough for our soldiers, it is good enough for the terrorists. There is obviously confusion about this. The President has determined that it is impractical to apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in U.S. district courts. Since those district court principles and rules are so similar to those in the military justice system, it's expected that there will be significant differences between the military commissions and the military justice system. Do you agree there will be significant differences between military commissions and the military justice system and that they shouldn't be equated?

Mr. HAYNES. Certainly there are significant differences between military commissions and the military justice system. While both are dedicated to securing justice, the differences are manifest and the two should not be equated.

12. Senator LEVIN. Mr. Haynes, please explain what you believe the key differences will be between trials at court-martial within the military justice system and trials before military commissions.

Mr. HAYNES. Although it is likely that there may be any number of differences between courts-martial and military commissions, the key difference known at this time is that military commissions will only be convened for those individuals defined in Section 2 of the President's Military Order.

QUESTION SUBMITTED BY SENATOR DANIEL K. AKAKA

PACIFIC LOCATION

13. Senator AKAKA. Secretary Wolfowitz, the media has reported that the Department of Defense is considering a site in the Pacific for a military tribunal. Has there been any discussion about the prospect of conducting a tribunal or detaining suspected terrorists in the Pacific, either on Guam, Wake Island, any other U.S. possession, or a U.S. Pacific military base like Kwajalein Atoll in the Republic of the Marshall Islands?

Secretary WOLFOWITZ. Secretary Rumsfeld has not made any decision regarding detention or trial of suspected terrorists in the Pacific region at this time.

QUESTIONS SUBMITTED BY SENATOR STROM THURMOND

VALUE OF MILITARY COMMISSION

14. Senator THURMOND. Secretary Wolfowitz, although there is no doubt that the President has the authority to establish Military Commission (sic), there is a question on the benefit of these commissions in regard to our Nation's image throughout the World. What do you consider the over riding value of these military commissions?

Secretary WOLFOWITZ. Military commissions are a vital tool in the ongoing war against terrorism because they provide our Nation with a means to protect our citizens, our allies, and other cooperating nations from further terrorist attacks. They help us to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks. They offer a path to achieve justice during a time when an extraordinary emergency exists for national defense purposes.

SCOPE OF TRIBUNALS

15. Senator THURMOND. Secretary Wolfowitz, in testimony before the Senate Judiciary Committee, Attorney General Ashcroft stated that the scope of offenses to be considered by the tribunals would be limited to war crimes. Do you agree with this

statement? If so what is (sic) definition of war crimes that will apply in this instance?

Secretary WOLFOWITZ. Secretary Rumsfeld is still deliberating regarding the scope of offenses to be considered by military commissions.

REFERRAL TO MILITARY TRIBUNAL

16. Senator THURMOND. Secretary Wolfowitz, who other than the President will make the determination that an individual will be tried before the military tribunal?

Secretary WOLFOWITZ. Consistent with his Military Order, the President is responsible for determining if an individual is subject to the Order and thus may be tried by military commission.

UNIFORM CODE OF MILITARY JUSTICE

17. Senator THURMOND. Mr. Haynes, Section 802 of Title 10, United States Code makes prisoners of war in the custody of the Armed Forces subject to the Uniform Code of Military Justice. Section 918 states that such person who commits murder "shall suffer death or imprisonment for life as a courts martial may direct." Do you intend to impose this standard on the military tribunal?

Mr. HAYNES. Secretary Rumsfeld is still deliberating regarding that decision.

BURDEN OF PROOF

18. Senator THURMOND. Mr. Haynes, what do you foresee as the burden of proof for conviction in military tribunals? Will proof beyond a reasonable doubt be too high a burden to impose on prosecutors? Will the burden of proof be higher than a preponderance of the evidence standard?

Mr. HAYNES. Secretary Rumsfeld is still deliberating regarding that decision.

STRUCTURE OF TRIBUNAL

19. Senator THURMOND. Mr. Haynes, how will you structure the military tribunal? Will members of the tribunal decide matters of fact and matters of law? Or will the tribunal be composed of a judge and jurors in a system analogous to American civil and criminal courts?

Mr. HAYNES. Secretary Rumsfeld is still deliberating regarding that decision.

CLASSIFIED INFORMATION

20. Senator THURMOND. Mr. Haynes, how will classified information be handled? Specifically, in what ways will the procedure differ from the use of classified material in the Federal courts under the Classified Information Procedures Act (18 U.S.C. app. 3)?

Mr. HAYNES. The Classified Information Procedures Act is a highly useful, important law that DOD is reviewing very closely. Secretary Rumsfeld is still deliberating with respect to the specific procedures for handling information, however.

QUESTIONS SUBMITTED BY SENATOR RICK SANTORUM

EXTRADITION

21. Senator SANTORUM. Secretary Wolfowitz, recently, several European Union countries have expressed concern with the President's order on the use of military tribunals. Spain, for example, has abolished the death penalty and bars extradition of suspects who could be executed overseas. What steps is the administration willing to take in the event that an ally refuses to extradite or turn over a suspect to face a military tribunal?

Secretary WOLFOWITZ. As noted previously, DOD is working closely with the Departments of State, Justice, and others to build upon our very successful effort to achieve a broad coalition of nations committed to defeating terrorism. Some allied governments have differing views on the issue of capital punishment, and we respect such views.

22. Senator SANTORUM. Secretary Wolfowitz, Secretary of Defense Donald Rumsfeld indicated that it might not be necessary to bring certain terrorists to justice if arrangements could be worked out with other governments willing to put these individuals on trial and ensure punishment. How does this statement apply to an ally or state that does not permit the use of the death penalty?

Secretary WOLFOWITZ. Any such case undoubtedly will present a unique set of circumstances and facts. DOD's response would have to be tailored to fit the unique circumstances and facts presented.

CONSTITUTIONAL PROTECTION

23. Senator SANTORUM. Secretary Wolfowitz, the Fifth Amendment guarantees the right to grand jury review prior to indictment, prohibits double jeopardy, protects against compulsory self-incrimination, and guarantees due process of law. The Sixth Amendment provides for the defendant to be afforded a speedy and public trial, to have the benefit of an impartial jury venued where the crime was committed, to be informed of the accusations against him, to be confronted by witnesses against him, to be able to use compulsory process to obtain favorable witnesses, and to have the assistance of counsel. Do you believe that these Amendments are at all applicable to a military tribunal, in the event that a tribunal is convened?

Secretary WOLFOWITZ. Although an individual subject to the President's Military Order is not entitled Fifth and Sixth Amendment protections in U.S. courts, Secretary Rumsfeld is committed to providing every such individual with appropriate due process rights sufficient to comply with the President's directive to provide a "full and fair trial."

24. Senator SANTORUM. Secretary Wolfowitz, while these are military trials and the accused are not U.S. citizens, some of the accused may be permanent residents. Do you feel it is appropriate to establish rules and procedures that closely follow the Fifth and Sixth Amendments?

Secretary WOLFOWITZ. As noted in the response to the preceding question, Secretary Rumsfeld is committed to providing every individual subject to the President's Military Order with appropriate due process rights. Our military commissions will be a beacon of fairness and a source of great pride for all Americans.

[Whereupon at 11:56 a.m., the committee adjourned.]

